SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

THE INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS,

vs.

THE CITY OF JERSEY CITY, FRED M. VINSON, STABILIZATION DIRECTOR BY CHESTER BOWLES, PRICE ADMINISTRATOR

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

INDEX.

	Original	Print
Record from D. C. U. S., District of New Jersey	1	1
Complaint	1	1
Affidavit of Arthur Potterton	7	10
Exhibits "1" to "5" (omitted in printing)	13	
Order convening statutory court and setting case for hearing	71	19
Summons and return (omitted in printing)	73	
Answer of Interstate Commerce Commission	75	20
Exhibit "A"—Order of Commission reopening proceedings in the matter of passenger fares of Hudson & Manhattan Railroad Company	81	23
Stipulation extending time of Hudson & Manhattan Railroad Company to plead (omitted in printing)	82	
Notice of motion for leave to file amended complaint	83	24
Order granting leave to file amended complaint	84	25
Amended complaint	85	25
Affidavit of Arthur Potterton	94	40
Exhibits "1" to "7" (omitted in printing)	103	
Notice of motion of Economic Stabilization Director for leave to file and serve petition (complaint)	171	54

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1944.

Record from D. C. U. S., District of New Jersey—Continued	Original	Print
Petition of Economic Stabilization Director for leave to intervene, for an interlocutory injunction, etc.	173	55
Exhibit "A"—Extracts from transcript of proceedings before Interstate Commerce Commission (omitted in printing)	182	
Exhibit "B"—Condensed income statement of the Hudson & Manhattan Railroad	197	66
Exhibit "C"—Motion of Economic Stabilization Director for modification and amendment of Interstate Commerce Commission's order of September 18, 1943, etc.	198	67
Stipulation extending time of Hudson & Manhattan Railroad Co., to plead (omitted in printing)	202	
Order granting motion of Economic Stabilization Director for leave to intervene	203	71
Answer of Hudson & Manhattan Railroad Co. to amended complaint	205	71
Exhibit "A"—Original complaint filed by City of Jersey City (omitted in printing)	215	
Exhibit "B"—Rule 101 of the Interstate Commerce Commission	221	87
Exhibit "C"—Letter dated October 25, 1943 from Charles Hershenstein and S. S. Eisen to W. P. Bartel (omitted in printing)	222	
Answer of Interstate Commerce Commission to amended complaint	223	88
Answer of the United States to amended complaint	229	92
Answer of Hudson & Manhattan Railroad Co. to petition of Economic Stabilization Director	231	93
Answer of Interstate Commerce Commission to petition of Economic Stabilization Director	235	98
Amended answer of Interstate Commerce Commission to amended complaint and to petition of Economic Stabilization Director	240	101
Affidavit of Walter F. Brown in opposition to motion for interlocutory injunction	242	102
Affidavit of Arthur Potterton in support of motion for interlocutory injunction	256	111
Per curiam opinion on interlocutory injunction	260	114
Findings and interlocutory injunction	263	116
Transcript of hearing on application for permanent injunction	285	118
Appearances	285	118
Opening statement of Mr. Hershenstein for the City of Jersey City	286	119
Offers in evidence by Mr. Booth for the Economic Stabilization Director	300	127
Offers in evidence by Mr. Finerty for the Hudson & Manhattan Railroad Co.	304	128

	Original	Print
Record from D. C. U. S. District of New Jersey—Continued		
Transcript of hearing on application for permanent injunction—Continued		
Argument of Mr. Hershenstein for the City of Jersey City	315	135
Argument of Mr. Booth for the Economic Stabilization Director	331	143
Argument of Mr. Finerty for the Hudson & Manhattan Railroad Co.	349	153
Argument of Mr. Eisen for the City of Jersey City in rebuttal	389	174
Argument of Mr. Booth for the Economic Stabilization Director in rebuttal	405	183
Argument of Mr. Finerty in reply	417	190
Opinion, McLaughlin, J.	425	194
Dissenting opinion, Fake, J.	434	201
Findings of fact and conclusions of law	440	205
Final decree granting permanent injunction	457	218
Stipulation and order enlarging time to docket appeal (omitted in printing)	460	
Petition for appeal	464	220
Assignment of errors	466	221
Order allowing appeal	483	234
Citation (omitted in printing)	485	
Cost bond (omitted in printing)	487	
Notice of appeal to Attorney General of New Jersey	490	235
Order as to exhibits	492	236
Stipulation as to record	494	237
Defendants'-Appellants' praecipe for consolidated record	496	238
Service of citation (omitted in printing)	503	
Docket entries	504	244
Clerk's certificate (omitted in printing)	508	
Exhibits:		
Plaintiff's Exhibit "2"—Report of the Interstate Commerce Commission of June 8, 1943 in the matter of passenger fares of Hudson & Manhattan Railroad Co.	509	248
Plaintiff's Exhibit "3"—Second report and order of the Interstate Commerce Commission of November 2, 1943 in the matter of passenger fares of Hudson & Manhattan Railroad Co.	524	272
Plaintiff's Exhibit "4"—Report of the Interstate Commerce Commission of July 11, 1938 in the matter of passenger fares of the Hudson & Manhattan Railroad Co.	534	286
Plaintiff's Exhibit "5"—Report and order of the Interstate Commerce Commission of August 3, 1943 on reconsideration in the matter of passenger fares of Hudson & Manhattan Railroad Co.	552	313
Plaintiff's Exhibit "6"—Petition filed before the Interstate Commerce Commission by Hudson & Manhattan Railroad Co. for reconsideration of findings and report of Commission of June 8, 1943	560	327

	Original	Print
Record from D. C. U. S., District of New Jersey—Continued		
Exhibits—Continued		
Plaintiff's Exhibit "7"—Reply of protestants to petition of Hudson & Manhattan Railroad Co., for reconsideration	573	345
Plaintiff's Exhibit "8"—Order of Interstate Commerce Commission of September 18, 1943 reopening proceedings	578	351
Intervenor's Exhibit "2"—Reply of Economic Stabilization Director to petition of Hudson & Manhattan Railroad Co. for reconsideration	580	352
Intervenor's Exhibit "3"—Exceptions of Economic Stabilization Director to report on further hearing proposed by Examiner	598	365
Hudson & Manhattan Exhibit "1"—Reply of Hudson & Manhattan Railroad Co. to motion of Economic Stabilization Director for modification of the Commission's order of September 18, 1943 and for reopening	623	380
Hudson & Manhattan Exhibit "2"—Letter dated October 25, 1943 from Charles Hershenstein and S. S. Eisen to W. P. Bartel	637	389
Hudson & Manhattan Exhibit "3"—Petition filed before Interstate Commerce Commission by Hudson & Manhattan Railroad Co. for reopening of proceedings, and for leave to publish and charge a 10 cent fare	639	390
Hudson & Manhattan Exhibit "4"—Reply of City of Jersey City to petition of Hudson & Manhattan Railroad Co. for reopening proceedings and for leave to publish and charge a 10 cent fare	660	404
Hudson & Manhattan Exhibit "6"—Letter dated October 17, 1942 from Harry R. Booth to W. P. Bartel	667	408
Hudson & Manhattan Exhibit "7"—Letter dated November 9, 1942 from Hudson & Manhattan Railroad Co. to the Price Administrator	668	409
Hudson & Manhattan Exhibit "11"—Stipulation of counsel as to certain traffic statistics	670	410
Interstate Commerce Commission Exhibit "1"—Order of November 13, 1942 granting OPA right to intervene	671	411
Interstate Commerce Commission Exhibit "2"—Order of July 13, 1942, reopening case on petition of Hudson & Manhattan Railroad Co.	672	412
Statement of points on which appellants intend to rely and designation of parts of record to be printed	673	413
Order noting probable jurisdiction	674	433

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CITY OF JERSEY CITY, Plaintiff,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HUDSON & MANHATTAN RAILROAD COMPANY, Defendants

COMPLAINT—Filed September 13, 1943

Plaintiff, The City of Jersey City, brings this action against the United States of America, the Interstate Commerce Commisison (hereinafter sometimes called the Commission), and Hudson & Manhattan Railroad Company (hereinafter sometimes called the Railroad), for the purpose of enjoining, setting aside and annulling an order of the Commission decided August 3, 1943, in the proceedings entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company", and alleges:

1. The jurisdiction of this Court over this action is under and pursuant to the provisions of Sections 41, subdivision (28), and Sections 43 to 48, inclusive, of Title 28 of the United States Code.

2. Plaintiff is a municipal corporation in the County of Hudson and State of New Jersey, and is a body politic. The matter covered by said order of the Commission arose in the District of New Jersey.

3. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

The defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transporta-

tion of passengers in interstate commerce, subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I, except those provisions which by their terms are not applicable to the interurban electric railway operated by the Hudson & Manhattan Railroad Company, and the order, hereinafter complained of, permits this railroad to increase its fares.

4. The defendant, Hudson & Manhattan Railroad Company, is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey. The railroad transports passengers only, and does not transport baggage, freight or express matter.

5. The railroad properties consist of an underground rapid transit passenger railway, furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New Jersey. The railroad operates its trains in two services, commonly referred to as the downtown line and the uptown line.

On the downtown line the trains operate (a) between the downtown terminal at Hudson Terminal, New York City, on the one hand, and on the other the New Jersey [fol. 2] stations of Exchange Place, Grove and Henderson Streets and Journal Square, and (b) between the downtown terminal at Hudson Terminal on the one hand, and on the other the New Jersey stations located at Exchange Place, Erie Station and Hoboken.

On the uptown line the trains operate (a) between the New Jersey stations of Hoboken on the one hand, and on the other New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the New Jersey stations at Journal Square, Grove and Henderson Streets and Erie Station, one the one hand, and on the other the New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

The railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between the downtown terminal at Hudson Terminal, New York, and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this

joint service operate over the lines of the railroad between the downtown terminal, Hudson Terminal at New York City, and the Journal Square station, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

6. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff and others in New Jersey the effectiveness of the aforesaid tariff was suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

7. After due hearing the Commission found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741 made three paramount findngs:

(1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.

(2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

8. Following the promulgation of the report and order, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, *Hudson & M. R. Co.* v. *U. S.*, 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District Court [fol. 3] for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court, for the District of New Jersey, *Hudson & M. R. Co.* v. *United States*, 33 Fed. Supp. 495, which was affirmed by the Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

9. Upon petition of the railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten cent fare on the downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

10. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

> (1) "That under normal circumstances the saturation point in increased fares (referring to the eight cent fare) on that traffic (downtown) has about been reached."
>
> (2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942, supra*, the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions on the interline traffic."

11. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare collection boxes. In connection therewith the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

12. The plaintiff, on July 14, 1943, replied to the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters herein alleged and thereby afford the plaintiff its right of cross-examination.

13. On August 3, 1943, upon the facts as aforesaid, without according the parties further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the [fol. 4] downtown line based on the alternative basis of

eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

14. In so providing for increased fares on the downtown line whereby the regular patron or so called commutation passenger would be required to pay nine and one-eleventh cents per ride, and the occasional rider ten cents per ride in lieu of the nine cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternatve basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

15. In the original report and order of the Commission, 277 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *U. S.*, *supra*, and affirmed by the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S.*, *supra*. A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8,

1943, 255 I. C. C. 649, and again in its report and order of August 3, 1943.

16. To the extent that the Commission permits the railroad to deliberately disregard the directive, contained in all of the reports and orders, as aforesaid, requiring the railroad to increase its revenues through proper adjustments of interline accounting with the Pennsylvania Railroad, and in lieu thereof permits increases in the local downtown fare notwithstanding the Commission's own statement, "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers," the Commission acts arbitrarily, disregards the evidence, and transcends the authority vested in it in the administration of the Act.

17. It is apparent that the Commission, in authorizing local downtown fares in excess of the nine cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross-examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure.

[fol. 5] 18. To the extent that the Commission relegates the right of the passenger to a reasonable fare to a position subordinate to an alleged carrier disability, the Commission disregards established law, that every passenger is entitled to a reasonable fare. The carrier's disability does not justify the assessment of unreasonable fares or charges.

19. It is evident that the Commission, in part, justifies the increased downtown fare by the reduction in the uptown fare from ten cents to eleven tokens for a dollar or in the alternative a ten cent fare payable only by a dime. In so doing the Commission commits grievous error of law. A passenger is entitled to a reasonable fare over any branch or line of the service, irrespective of the fares or level of fares on other services thereof.

20. In requiring the establishment of an uptown fare of eleven tokens for one dollar or in the alternative a cash fare of ten cents payable only by a dime and permitting the establishment of the same fare on the downtown line the Commission wholly and completely disregards the evidence and facts of record by which it arrived at the conclusion that:

> "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents"

and in so doing the Commission disregards and overrules the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

21. The basic findings of the Commission in its report and order of August 3, 1943, are unsupported by any probative evidence of record. Such basic findings flow from the acceptance of the carrier contention of alleged disability. However, even assuming that the facts were properly and judiciously in evidence, they are inadequate, as a matter of law, to support the Commission's ultimate findings. A fare in excess of nine cents, theretofore found to be unreasonable does not *ipso facto* become reasonable and proper because of a carrier disability.

22. In view of all of the facts hereinbefore set forth the order of the Commission of August 3, 1943, was arbitrary and capricious without foundation in law, based upon errors of law, and without adequate findings or any evidence to support them and contrary to the evidence of record, and in violation of the Interstate Commerce Act, and in violation of the specific interpretations of the governing law, made by the Federal Courts, including the United States Supreme Court, and accordingly the Commission acted in so arbitrary and unreasonable a manner as to render its order, although within the form of its delegated power, void.

23. The effectiveness of transportation fares on the downtown line in excess of the prescribed reasonable maximum fare of nine cents will create an undue and unjust

burden upon the local downtown passenger in violation of the Interstate Commerce Act, and unless the enforcement, operation and execution of the Commission's order of August 3, 1943, is restrained will cause plaintiff and the members of its body politic great damages as aforesaid for which plaintiff has no adequate remedy at law.

24. Attached hereto and made a part hereof, as Exhibits, are the following:

Exhibit No. 1. The report and order of the Interstate Commerce Commission dated July 11, 1938, reported at 227 I.C.C. 741.

Exhibit No. 2. The report and order of the Interstate Commerce Commission dated June 8, 1943, reported at 255 I.C.C. 649.

[fol. 6] Exhibit No. 3. The report and order of the Interstate Commerce Commission dated August 3, 1943.

Exhibit No. 4. The petition of the Hudson & Manhattan Railroad Company dated July 8, 1943, for Reconsideration and Modification of the Findings Made by the Commission in its Report on Further Hearing.

Exhibit No. 5. Reply of Protestants dated July 14, 1943, to the petition of the Hudson & Manhattan Railroad Company dated July 8, 1943.

Wherefore, plaintiff prays:

First: That, upon the final hearing, the Judge shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge.

Second: That process may issue against defendants, United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, and that due and proper service of such process of this complaint be forthwith made upon the United States of America by delivering a copy of the summons and of the complaint to the United States Attorney for the District of New Jersey, and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States of America at Washington, D. C., and upon the Interstate Commerce Commission by sending a copy of the summons and of the complaint by registered mail to the Secretary of the Interstate Commerce Commission, Wash-

ington, D. C., and upon the Hudson & Manhattan Railroad Company, by serving a copy of the summons and of the complaint upon the registered agent of said company.

Third: That upon final hearing of this cause this Court adjudge, order and decree that the said order of the Commission dated August 3, 1943, in so far as such order permits the establishment of any local interstate fare in excess of nine cents for transportation on the downtown line, is, and has at all times been, beyond the lawful authority of said Commission and wholly null and void and that said order be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Fourth: That pending said final hearing, and in the meantime, a temporary injunction and restraint issue enjoining the defendants from so much of said Order of August 3, 1943, which permits the establishment of any local interstate fare in excess of nine cents for transportation on the downtown line.

Fifth: That this Court grant to plaintiff such order and further relief as may be proper in the premises.

(Sgd.) Charles A. Rooney, Attorney for Plaintiff.

(Sgd.) Charles Hershenstein, Of Counsel.

[fol. 7] AFFIDAVIT OF ARTHUR POTTERTON IN SUPPORT OF COMPLAINT

STATE OF NEW JERSEY,
County of Hudson, ss.:

ARTHUR POTTERTON, of full age, being duly sworn according to law on his oath deposes and says:

I am Acting Mayor of Jersey City. I have read the foregoing complaint and the matters and things therein set forth are true to the best of my knowledge, information and belief. The plaintiff, City of Jersey City, brings this action against the United States of America, the Interstate Commerce Commission (hereinafter sometimes called the Commission), and Hudson & Manhattan Railroad Company (hereinafter sometimes called the Railroad), for the purpose of enjoining, setting aside and annulling an order

of the Commission decided August 3, 1943, in the proceedings entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company":

1. The jurisdiction of this Court over this action is under and pursuant to the provisions of Sections 41 subdivision (28), and Sections 43 to 48, inclusive, of Title 28 of the United States Code.

2. Plaintiff is a municipal corporation in the County of Hudson and State of New Jersey, and is a body politic. The mater covered by said order of the Commission arose in the District of New Jersey.

3. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

The defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I, except those provisions which by their terms are not applicable to the interurban electric railway operated by the Hudson & Manhattan Railroad Company, and the order, hereinafter complained of, permits this railroad to increase its fares.

4. The defendant, Hudson & Manhattan Railroad Company is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey. The railroad transports passengers only, and does not transport baggage, freight or express matter.

5. The railroad properties consist of an underground rapid transit passenger railway, furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New

Jersey. The railroad operates its trains in two services, commonly referred to as the downtown line and the uptown line.

On the downtown line the trains operate (a) between the downtown terminal at Hudson Terminal, New York City, on the one hand, and on the other the New Jersey stations [fol. 8] of Exchange Place, Grove and Henderson Streets and Journal Square, and (b) between the downtown terminal at Hudson Terminal on the one hand, and on the other the New Jersey stations located at Exchange Place, Erie Station and Hoboken.

On the uptown line the trains operate (a) between the New Jersey stations of Hoboken on the one hand, and on the other New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the New Jersey stations at Journal Square, Grove and Henderson Streets and Erie Station, on the one hand, and on the other the New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

The railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between the downtown terminal at Hudson Terminal, New York, and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the railroad between the downtown terminal, Hudson Terminal at New York City, and the Journal Square station, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

6. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I.C.C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff and others in New Jersey the effectiveness of the aforesaid tariff was

suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

7. After due hearing the Commission found, 227 I.C.C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I.C.C. 741 made three paramount findings:

(1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I.C.C. 741, 754.

(2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I.C.C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I.C.C. 741, 762.

8. Following the promulgation of the report and order, 227 I.C.C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, *Hudson & M. R. Co.* v. *U. S.*, 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District Court [fol. 9] for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court, for the District of New Jersey, *Hudson & M. R. Co.* v. *United States*, 33 Fed. Supp. 495, which was affirmed by the Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

9. Upon petition of the railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten cent fare on the downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

10. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942, supra*, the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions on the interline traffic."

11. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine

cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare collection boxes. In connection therewith the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternaitve cash fare payable only by a dime.

12. The plaintiff, on July 14, 1943, replied to the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters herein alleged and thereby afford the plaintiff its right of cross examination.

13. On August 3, 1943, upon the facts as aforesaid, without according the parties further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown [fol. 10] line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

14. In so providing for increased fares on the downtown line whereby the regular patron or so called commutation passenger would be required to pay nine and one-eleventh cents per ride, and the occasional rider ten cents per ride in lieu of the nine cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation bur-

den of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

15. In the original report and order of the Commission, 277 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *U. S., supra,* and affirmed by the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S., supra.* A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649, and again in its report and order of August 3, 1943.

16. To the extent that the Commission permits the railroad to deliberately disregard the directive, contained in all of the reports and orders, as aforesaid, requiring the railroad to increase its revenues through proper adjustments of interline accounting with the Pennsylvania Railroad, and in lieu thereof permits increases in the local downtown fare notwithstanding the Commission's own statement, "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers;" the Commission acts arbitrarily, disregards the evidence, and transcends the authority vested in it in the administration of the Act.

17. It is apparent that the Commission, in authorizing local downtown fares in excess of the nine cent fare stated

to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure.

[fol. 11] 18. To the extent that the Commission relegates the right of the passenger to a reasonable fare to a position subordinate to an alleged carrier disability, the Commission disregards established law, that every passenger is entitled to a reasonable fare. The carrier's disability does not justify the assessment of unreasonable fares or charges.

19. It is evident that the Commission, in part, justifies the increased downtown fare by the reduction in the uptown fare from ten cents to eleven tokens for a dollar or in the alternative a ten cent fare payable only by a dime. In so doing the Commission commits grevious error of law. A passenger is entitled to a reasonable fare over any branch or line of the service, irrespective of the fares or level of fares on other services thereof.

20. In requiring the establishment of an uptown fare of eleven tokens for one dollar or in the alternative a cash fare of ten cents payable only by a dime and permitting the establishment of the same fare on the downtown line the Commission wholly and completely disregards the evidence and facts of record by which it arrived at the conclusion that:

> "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents"

and in so doing the Commission disregards and overrules the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

21. The basic findings of the Commission in its report and order of August 3, 1943, are unsupported by any probative evidence of record. Such basic findings flow from the acceptance of the carrier contention of alleged disability. However, even assuming that the facts were properly and judiciously in evidence, they are inadequate, as a matter of law, to support the Commission's ultimate findings. A fare in excess of nine cents, theretofore found to be unreasonable does not *ipso facto* become reasonable and proper because of a carrier disability.

22. In view of all of the facts hereinbefore set forth the order of the Commission of August 3, 1943, was arbitrary and capricious without foundation in law, based upon errors of law, and without adequate findings or any evidence to support them and contrary to the evidence of record, and in violation of the Interstate Commerce Act, and in violation of the specific interpretations of the governing law, made by the Federal Courts, including the United States Supreme Court, and accordingly the Commission acted in so arbitrary and unreasonable a manner as to render its order, although within the form of its delegated power, void.

23. The effectiveness of transportation fares on the downtown line in excess of the prescribed reasonable maximum fare of nine cents will create an undue and unjust burden upon the local downtown passenger in violation of the Interstate Commerce Act, and unless the enforcement, operation and execution of the Commission's order of August 3, 1943, is restrained will cause plaintiff and the members of its body politic great damages as aforesaid for which plaintiff has no adequate remedy at law.

24. Attached hereto and made a part hereof, as Exhibits, are the following:

Exhibit No. 1. The report and order of the Interstate Commerce Commission dated July 11, 1938, reported at 227 I. C. C. 741.

Exhibit No. 2. The report and order of the Interstate Commerce Commission dated June 8, 1943, reported at 255 I. C. C. 649.

[fol. 12-70] Exhibit No. 3. The report and order of the Interstate Commerce Commission dated August 3, 1943.

Exhibit No. 4. The petition of the Hudson & Manhattan Railroad Company dated July 8, 1943, for Reconsideration and Modification of the Findings Made by the Commission in its Report on Further Hearing.

Exhibit No. 5. Reply of Protestants dated July 14, 1943, to the petition of the Hudson & Manhattan Railroad Company dated July 8, 1943.

(Sgd.) Arthur Potterton.

Sworn and subscribed to before me at Jersey City this September 7th, 1943. (Sgd.) Ann G. Hogan, Notary Public of New Jersey.

[fol. 71] In the United States District Court

[Title omitted]

Order Convening Statutory Court and Setting Case for Hearing—September 14, 1943

It appearing that plaintiff in the above entitled cause on September 13, 1943, filed a complaint seeking to have perpetually set aside and annulled so much of the Order of the Interstate Commerce Commission dated August 3, 1943 in a proceeding entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" which permits the establishment of a local interstate fare in excess of nine cents for transportation on its downtown line, and to perpetually enjoin the enforcement of said order in which said complaint the plaintiff also seeks a temporary injunction and restraint enjoining the enforcement of so much of said order of August 3, 1943 which permits the establishment of any local interstate fare in excess of nine cents for transportation on its downtown line, and that the said complaint prays that the judge shall call to his assistance in the hearing and determination of this cause two other judges of whom at least one shall be a Circuit Judge; and

It further appearing that the matter of the issuance of a temporary injunction and restraint should be forthwith heard and determined,

Honorable Gerald McLaughlin, United States Circuit Judge, Third Circuit, and Honorable Guy L. Fake, United

[fols. 72-74] States District Judge for the District of New Jersey, are hereby called to the assistance of the Judge of this Court whose signature is affixed hereto for the hearing and determination in the application for a temporary injunction and restraint and for the hearing and determination of the said cause; and

It is Ordered by the Court that the application for the temporary injunction and restraint in the herein above entitled cause be and it is hereby set for hearing at the United States Court in Newark, N. J. on Sept. 21st, 1943 at 10:30 o'clock in the forenoon.

Dated, Newark, N. J. September 14, 1943.

Thomas F. Meaney, U. S. D. J.

[fol. 75] In the District Court of the United States

[Title omitted]

Answer of Interstate Commerce Commission—Filed September 25, 1943

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, for answer to the complaint heretofore filed in this case, answers and says:

I

Answering the allegations of paragraphs 1 to 6, inclusive, of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph 7 of the complaint, the Commission respectfully refers the court to its decision, reported in 227 I. C. C. 741, annexed to the complaint as Exhibit No. 1, for more full and complete information concerning the findings of the Commission than is contained in said paragraph.

III

Answering the allegations of paragraph 8 of the complaint, the Commission admits the same.

[fol. 76]

IV

Answering the allegations of paragraphs 9 and 10 of the complaint, the Commission respectfully refers the court to its decision of June 8, 1943, 255 I. C. C. 649, for more complete information concerning its findings than is contained in said paragraphs. The Commission's report of June 8, 1943, is attached to the complaint as Exhibit No. 2, to which the Commission respectfully refers the court.

V

Answering the allegations of paragraph 11 of the complaint, the Commission admits the filing by the railroad of the petition for reconsideration therein referred to. Said petition for reconsideration is attached to and made a part of the complaint as Exhibit No. 4, to which the Commission respectfully refers the court for more full and complete information concerning its contents than is contained in said paragraph.

VI

Answering the allegations of paragraph 12 of the complaint, the Commission admits the same but refers the court to the plaintiff's reply to the railroad's petition for reconsideration, which is attached to the complaint as Exhibit No. 5.

VII

Answering the allegations of paragraphs 13 and 14 of the complaint, the Commission respectfully refers the court to its report of August 3, 1943, for more full and complete information concerning its findings than is contained in said paragraphs. Said report of August 3, 1943, is attached to the complaint as Exhibit No. 3, to which the Commission respectfully refers the court.

[fol. 77]

VIII

Answering the allegations of paragraph 15 of the complaint, the Commission admits the same.

IX

Answering the allegations of paragraphs 16 to 23, inclusive, of the complaint, the Commission denies the same.

X

Answering the allegations of paragraph 24 of the complaint, the Commission admits that the exhibits therein referred to are true copies of such documents.

Further answering the complaint as a whole, the Commission alleges that in the proceedings giving rise to this suit the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearing provided by the Interstate Commerce Act; that in said hearing testimony and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiff herein, its said reports and orders; that said reports and orders included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by the said reports, the Commission made the findings and stated the conclusions upon which its orders was based.

[fol. 78] The Commission further alleges that the findings and conclusions in said reports and orders were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said reports and orders were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them, that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

To the extent that the allegations contained in the complaint are in conflict with statements and findings contained in its said reports, the Commission denies the same.

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports of July 30, 1938, June 8, 1943, and August 3, 1943, referred to and made a part of the petition as Exhibits Nos. 1, 2 and 3, respectively, which reports and orders are hereby referred to and made parts hereof.

[fol. 79] Further answering the allegations of the complaint, the Commission alleges that on September 18, 1943, it made and entered an order reopening this proceeding for further hearing, a copy of which is attached to this answer as Exhibit A.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 80] *Duly sworn to by Claude R. Porter. Jurat omitted in printing.*

[fols. 81-82] EXHIBIT A TO ANSWER OF I. C. C.

Interstate Commerce Commission

Order

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 18th day of September, 1943

Investigation & Suspension Docket No. 4394

Passenger Fares Of Hudson & Manhattan Railroad Company

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,

It Is Ordered, That this proceeding be reopened for further hearing to permit any party hereto to present evidence

directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission.

It Is Further Ordered, That this proceeding be assigned for such further hearing before Examiner Koch in the Commission's Offices at Washington, D. C., on September 28, 1943, at 10:00 o'clock A. M.

By the Commission, W. P. Bartel, Secretary. (Seal.)

[fol. 83] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT—Filed November 18, 1943

To: The Attorney General of the United States, at Washington, D. C., and Hon. Charles M. Phillips, United States Attorney for the District of New Jersey, Attorneys for United States of America;

Daniel W. Knowlton, Esq., Chief Counsel and E. M. Reidy, Assistant Chief Counsel, Attorneys for Interstate Commerce Commission;

Collins & Corbin, Esqs., John Finerty, Esq., and John E. Buck, Esq., Attorneys for Hudson & Manhattan Railroad Company.

SIRS:

Please Take Notice, that the undersigned will move this Court on behalf of the plaintiff, City of Jersey City, on the 19th day of November, 1943, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court Room of the United States District Court for the District of New Jersey, Post Office Building, Newark, New Jersey,

upon the complaint filed herein and upon all proceedings heretofore had herein for an order granting leave to plaintiff to file and serve the annexed amended complaint, and for such other and further relief as to this Court may be just and proper in the premises.

Dated November 15, 1943.

(S.) Charles A. Rooney, Attorney for Plaintiff, City of Jersey City, City Hall, Jersey City, N. J.

(S.) Charles Hershenstein, Of Counsel.

[fol. 84] In the United States District Court

[Title omitted]

Order Granting Leave to File Amended Complaint—November 19, 1943

Application having been made by the plaintiff herein for leave to file and serve an amended complaint, due notice of said application having been given to all of the parties to these proceedings, and no one objecting thereto and good cause appearing therefor;

It is, on this Nineteenth day of November, 1943, Ordered that leave is hereby granted to the plaintiff to file the attached amended complaint and to serve copies thereof upon all parties interested in the proceeding.

Thomas P. Meany, Judge, United States District Court.

[fol. 85] In the United States District Court

[Title omitted]

Amended Complaint—Filed November 18, 1943

Plaintiff, The City of Jersey City, brings this action against the United States of America, the Interstate Commerce Commission (hereinafter sometimes called the Commission), and Hudson & Manhattan Railroad Company (hereinafter sometimes called the Railroad), for the purpose of enjoining, setting aside and annulling the orders of the Commission decided June 8, 1943 (attached hereto as

Exhibit 2), and November 2, 1943 (attached hereto as Exhibit 7), in the proceedings entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company", and alleges:

1. The jurisdiction of this Court over this action is under and pursuant to the provisions of Section 41, subdivision (28), and Sections 43 to 48, inclusive, of Title 28 of the United States Code.

2. Plaintiff is a municipal corporation in the County of Hudson and State of New Jersey, and is a body politic. The matter covered by said order of the Commission arose in the District of New Jersey.

3. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

The defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I, except those provisions which by their terms are not applicable to the interurban electric railway operated by the Hudson & Manhattan Railroad Company, and the order, hereinafter complained of, permits this railroad to increase its fares.

4. The defendant, Hudson & Manhattan Railroad Company is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey. The railroad transports passengers only, and does not transport baggage, freight or express matter.

5. The railroad properties consist of an underground rapid transit passenger railway, furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New

Jersey. The railroad operates its trains in two services commonly referred to as the downtown line and the uptown line.

On the downtown line the trains operate (a) between the downtown terminal at Hudson Terminal, New York City, on the one hand, and on the other the New Jersey stations [fol. 86] of Exchange Place, Grove and Henderson Streets and Journal Square, and (b) between the downtown terminal at Hudson Terminal on the one hand, and on the other the New Jersey stations located at Exchange Place, Erie Station and Hoboken.

On the uptown line the trains operate (a) between the New Jersey stations of Hoboken on the one hand, and on the other New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the New Jersey stations at Journal Square, Grove and Henderson Streets and Erie Station, on the one hand, and on the other the New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

The railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between the downtown terminal at Hudson Terminal, New York, and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the railroad between the downtown terminal, Hudson Terminal at New York City, and the Journal Square station, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

6. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff and others in New Jersey the effectiveness of the aforesaid tariff was suspended and the lawfulness of the proposed increase in

the downtown fare was made the subject matter of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

7. After due hearing the Commission on July 11, 1938, found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight-cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741, made three paramount findings:

> (1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.
>
> (2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.
>
> (3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

8. Following the promulgation of the report and order of July 11, 1938, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, *Hudson & M. R. Co.* v. *U. S.*, 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District [fol. 87] Court for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court for the District of New Jersey, *Hudson & M. R. C.* v. *United States*, 33 Fed. Supp. 495, which was affirmed by the Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

9. Upon petition of the railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten-cent

fare on the downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

10. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight-cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions on the interline traffic."

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an eight-cent or a nine-cent fare than for a ten-cent fare on the downtown line of respondent."

11. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the

Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine-cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurment of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare-collection boxes. In connection therewith, the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

12. The plaintiff, on July 14, 1943, replied to the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters herein alleged and thereby afford the plaintiff its right of cross examination.

[fol. 88] 13. On August 3, 1943, upon the facts aforesaid, without according the parties further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

14. In so providing for increased fares on the downtown line whereby the regular patron or so-called commutation passenger would be required to pay nine and one-eleventh

cents per ride, and the occasional rider ten cents per ride in lieu of the nine-cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons herein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

In the original report and order of the Commission made July 11, 1938, 227 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight-cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *U. S., supra,* and affirmed by the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S., supra.* A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649 and again in its report and order of August 3, 1943.

The Commission acted arbitrarily and capriciously in permitting the railroad to increase the burden imposed upon the local downtown passenger in view of the carrier's dereliction to abide by the directive of the Commission to obtain additional revenue from increased divisions from interline traffic.

15. To the extent that the Commission permits the railroad to deliberately disregard the directive, contained in all of the reports and orders, as aforesaid, requiring the rail-

road to increase its revenues through proper adjustments of interline accounting with the Pennsylvania Railroad, and in lieu thereof permits increases in the local downtown fare notwithstanding the Commission's own statement, "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers," the Commission acts arbitrarily, disregards the evidence, and transcends the authority vested in it in the administration of the Act.

16. The Commission, in authorizing local downtown fares in excess of the nine-cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier [fol. 89] disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure.

17. To the extent that the Commission relegates the right of the passenger to a reasonable fare to a position subordinate to an alleged carrier disability, the Commission disregards established law, that every passenger is entitled to a reasonable fare. The carrier's disability does not justify the assessment of unreasonable fares or charges.

18. The Commission, in part, justifies the increased downtown fare by the reduction in the uptown fare from ten cents to eleven tokens for a dollar or in the alternative a ten-cent fare payable only by a dime. In so doing the Commission commits grievous error of law. A passenger is entitled to a reasonable fare over any branch or line of the service irrespective of the fares or level of fares on other services thereof.

19. In requiring the establishment of an uptown fare of eleven tokens for one dollars or in the alternative a cash fare of ten cents payable only by a dime and permitting the establishment of the same fare on the downtown line the Commission wholly and completely disregards the evidence and facts of record by which it arrived at the conclusion that:

"From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents"

and in so doing the Commission disregards and overrules the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

20. The basic findings of the Commission in its report and order of August 3, 1943, are unsupported by any probative evidence of record. Such basic findings flow from the acceptance of the carrier contention of alleged disability. However, even assuming that the facts were properly and judiciously in evidence, they are inadequate, as a matter of law, to support the Commission's ultimate findings. A fare in excess of nine cents, theretofore found to be unreasonable does not *ipso facto* become reasonable and proper because of a carrier disability.

21. On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, having for its purpose the enjoining of the report and order of August 3, 1943. Application was made, upon filing said bill, for a temporary restraint against putting into effect said order and a statutory court was duly established to hear said application.

22. By order dated September 18, 1943, and prior to hearing of the application for a temporary restraint, the Interstate Commerce Commission reopened the instant proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto * * * the right to cross examine adverse witnesses." Such reopening was occasioned wholly by the filing of the complaint by the City of Jersey City, as aforesaid, "out of an abundance of caution," language of the Interstate Commerce Commission in its report and order dated November 2, 1943.

[fol. 90] The Interstate Commerce Commission order of reopening, dated September 18, 1943, as above described, by the terms thereof, specifically limited the scope of the rehearing wholly and solely to permit the railroad to establish such evidence of changed conditions since the previous hearings as would improve their position in the proceeding. By the same token and at the same time, the Commission's order of September 18, 1943, as defined by the trial examiner, specifically limited and precluded the other parties to the proceeding, which includes the plaintiff herein, from offering any evidence or testimony relative to changed conditions that occurred since the previous hearings which would establish the lack of need, by the railroad, for any revenue over and above that produced by the existing eight-cent local downtown fare.

23. This proceeding before the Interstate Commerce Commission was and is wholly and solely a revenue proceeding. The railroad seeks authorization to increase its existing fares for the sole purpose of providing additional revenue which it claims it needs. The railroad's position, as indicated in the decision of the Interstate Commerce Commission of June 8, 1943, is that:

> "under present fares (eight cents on the local downtown line and ten cents on the uptown line) it would be necessary for its annual traffic to increase by about 30 per cent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

The plaintiff endeavored to submit proof that the railroad's patronage had been increased by an amount in excess of 30 per cent, 1943 over 1941, and that no additional revenue was necessary or could properly be prescribed over and above that resulting from the existing eight-cent local downtown fare, but the Commission declined to receive any proof offered by the plaintiff in this regard. Moreover, if any additional revenue is needed by the railroad, which the record disputes, such revenue should be obtained through increased divisions of the interline traffic following the directives of the Interstate Commerce Commission as set forth hereinbefore.

24. To the extent that the Commission precluded the plaintiff from bringing the stale record down to date with

respect to the railroad's patronage and need for revenue, the Commission acted arbitrarily and capriciously and deprived the plaintiff of its full day in Court with respect to that reopened proceeding, and denied plaintiff due process of law under the Federal Constitution.

25. Because of the inability of the parties to the proceeding before the Interstate Commerce Commission to present testimony and evidence relative to changed circumstances and conditions, petitions for further hearing were presented by the protestants before the Interstate Commerce Commission but such petitions were denied on November 2, 1943, because the Commission stated that:

> "We have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

To the extent that the Commission prejudges and prophesies its findings that would result from a hearing not yet held the Commission acts arbitrarily, capriciously and beyond the scope of proper judicial proceeding, and is guilty of an abuse of discretion.

26. The Order of the Interstate Commerce Commission dated June 8, 1943, is in itself illegal and reflects conclusions arbitrarily made without proper support in the record, in that the Commission authorized an increase in fares from eight to nine cents predicated upon an alleged revenue need of the carrier without in effect finding that revenue was needed and that such revenue should be obtained from [fol. 91] the local downtown passengers. As a matter of fact, the Commission found that any increase in revenue should be provided by the joint interline traffic through the medium of increased divisions to the Hudson & Manhattan Railroad. Moreover, the Commission predicated its order of June 8, 1943, authorizing the increase from eight to nine cents upon the fact that it had previously authorized railroads operating in interstate commerce, parties to a proceeding before it known as *Exparte* 148, *Increased Railway Rates, Fares and Charges*, 1942, 248 I. C. C. 545, "to increase passenger fares by an amount of 10 per cent and freight rates by an amount of 6 per cent." The defendant, Hudson & Manhattan Railroad Company was named originally as a party in *Ex Parte* 148, but upon

its own motion the railroad company was eliminated as a party to the proceedings and this, upon the ground that the railroad company refused to be bound by any order which the Interstate Commerce Commission might make in those proceedings predicated upon the evidence produced therein. Subsequent to the Interstate Commerce Commission decision in *Ex Parte* 148, and upon petitions filed by interested parties, the Interstate Commerce Commission found that the railroad carriers operating in interstate commerce in the United States no longer required increased revenues and that accordingly there was no justification for the maintenance of the *Ex Parte* 148, increases. Accordingly the Interstate Commerce Commission ordered the railroads to cancel from their tariffs the 6 per cent increase authorized on freight traffic. Concurrently, the Commission found that while the rail carriers offered no justification for the continuance of the 10 per cent increase on passenger fares, nevertheless, it deemed its continuance in the interest of the National Defense program in that the removal of the 10 per cent in increase in passenger fares, which was no longer justified, would tend to attract and otherwise induce augmented passenger patronage to the railroads, which was not desirable, and in order to discourage any increase in transportation of passengers the Interstate Commerce Commission continued the 10 per cent increase on passenger traffic.

Notwithstanding the facts stated above, the Interstate Commerce Commission in its order of June 3, 1943, in this case predicated the increase in the railroad local downtown fare from eight to nine cents upon the statement that "an increase to that amount would be consistent with that decision," referring to the decision in *Ex Parte* 148. Such increase, however, is not consistent with that decision in that:

(a) The Hudson & Manhattan Railroad Company was not a party to the proceeding in *Ex Parte* 148;

(b) The revenue position of the Hudson & Manhattan Railroad is specifically set forth in the record in this proceeding and does not justify any increase in fares; and

(c) The record in this proceeding establishes, and all parties agree, that the traffic of the Hudson & Manhat-

tan Railroad is predominantly that of commuters occupying a situation wholly distinct and different from the general passenger patronage of railroads generally in the United States, and accordingly such commuter traffic cannot be treated in the light of conditions affecting railroad passenger patronage generally in the United States. Commuter traffic cannot be curtailed by levy in the form of increased and exorbitant fares.

27. Plaintiff further alleges and charges that in making its findings of November 2, 1943, wherein the Commission reiterated the findings previously made by it in its report and order of August 3, 1943, the Commission merely went through the motions of giving protestants its day in Court. The Commission's findings authorizing an increase in the local downtown fare to an alternative fare basis of eleven tokens for one dollar or a cash fare of one dime conditioned upon the establishment and maintenance of the same alternative fare basis on the uptown line was predicated, (1) upon the alleged inability of the railroad to collect a nine-[fol. 92] cent fare in its present coil collecting facilites, and (2) upon the fact that such alternative fare basis is the only practical method of collecting fares to be used universally on the railroad. The testimony in evidence upon which these findings were made were nebulous in character and fraught with contradictions.

The Commission in finding that it is impracticable for respondent to collect a cash fare of nine cents does so in the face of testimony and evidence of the railroad that it is physically possible so to do with the existing mechanical devices merely by removing the fare-counting mechanism presently contained in the collecting devices. The Commission entirely and completely disregards this evidence as it does also the fact that rapid transit lines throughout the country make fare collections in coin receptacles that do not have counting devices. To the extent that the Commission disregarded this evidence and testimony and refused to make any findings with respect to the railroad's ability to collect the nine-cent fare in its present mechanism it acted arbitrarily, capriciously and beyond the scope of its delegated authority, and was guilty of a gross abuse of discretion.

28. While finding that the alternative fare collection is the only practical method available to the railroad for uni-

versal application on its facilities, the Commission completely disregards and discards the railroad's own testimony of record that such token arrangements cannot possibly be used on its intrastate facilities. To the extent that the Commission disregards and discards this evidence and testimony, it commits grievous error of fact and law.

29. The prescription by the Interstate Commerce Commission of a uniform scale of fares on both the uptown and downtown line completely disregards and overrules the previous findings made by it, the Federal Courts and the United States Supreme Court on precisely the same factual situation. To this extent the Commission acted arbitrarily, capriciously and beyond the scope of its delegated authority. In so doing the Commission entirely disregarded the facts of record which portray the related services accorded to the passenger, the cost of the service to the railroad, and the value of the service to the passenger.

30. In view of all of the facts hereinbefore set forth the orders of the Commission of June 8, 1943, and November 2, 1943, were arbitrary and capricious without foundation in law, based upon errors of law, and without adequate findings or any evidence to support them and contrary to the evidence of record, and in violation of the Interstate Commerce Act, and in violation of the specific interpretations of the governing law, made by the Federal Courts, including the United States Supreme Court, and accordingly the Commission acted in so arbitrary and unreasonable a manner as to render its orders, although within the form of its delegated power, void.

31. The effectiveness of transportation fares on the downtown line in excess of the reasonable maximum fare of eight cents will create an undue and unjust burden upon the local downtown passenger in violation of the Interstate Commerce Act, and unless the enforcement, operation and execution of the Commission's orders of June 8, 1943, and November 2, 1943, are restrained will cause plaintiff and the members of its body politic great damages as aforesaid for which plaintiff has no adequate remedy at law.

32. Attached hereto and made a part hereof, as Exhibits, are the following:

Exhibit No. 1. The report and order of the Interstate Commerce Commission dated July 11, 1938, reported at 227 I. C. C. 741.

[fol. 93] Exhibit No. 2. The report and order of the Interstate Commerce Commission dated June 8, 1943, reported at 255 I. C. C. 649.

Exhibit No. 3. The report and order of the Interstate Commerce Commission dated August 3, 1943.

Exhibit No. 4. The petition of the Hudson & Manhattan Railroad Company dated July 8, 1943, for Reconsideration and Modification of the Findings Made by the Commission in its Report on Further Hearing.

Exhibit No. 5. Reply of Protestants dated July 14, 1943, to the petition of the Hudson & Manhattan Railroad Company dated July 8, 1943.

Exhibit No. 6. Order of the Interstate Commerce Commission, dated September 18, 1943, reopening the proceedings for further hearing and circumscribing the plaintiff's right to produce evidence.

Exhibit No. 7. The report and order of the Interstate Commerce Commission dated November 2, 1943.

Wherefore plaintiff prays:

First. That, upon the final hearing, the Judge shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge.

Second. That process may issue against defendants, United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, and that due and proper service of such process of this complaint be forthwith made upon the United States of America by delivering a copy of the summons and of the complaint to the United States Attorney for the District of New Jersey, and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States of America at Washington, D. C., and upon the Interstate Commerce Commission by sending a copy of the summons and of the complaint by registered mail to the Secretary of the Interstate Commerce Commission, Washington, D. C., and upon the Hudson & Manhattan Railroad Company, by serving a copy of the summons and of the complaint upon the registered agent of said company.

Third. That upon final hearing of this cause this Court adjudge, order and decree that the said orders of the Commission dated June 8, 1943, and November 2, 1943, in so far as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line, is, and has at all times been, beyond the lawful authority of said Commission and wholly null and void and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Fourth: That pending said final hearing, and in the meantime, a temporary injunction and restraint issue enjoining the defendants from so much of said Orders of June 8, 1943, and November 2, 1943, which permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line.

Fifth. That this Court grant to plaintiff such order and further relief as may be proper in the premises.

(Sgd.) Charles A. Rooney, Attorney for Plaintiff.
(Sgd.) Charles Hershenstein, of Counsel.

[fol. 94] AFFIDAVIT OF ARTHUR POTTERTON IN SUPPORT OF AMENDED COMPLAINT

STATE OF NEW JERSEY,
County of Hudson, ss.:

ARTHUR POTTERTON, of full age, being duly sworn according to law on his oath deposes and says:

I am Acting Mayor of Jersey City. I have read the foregoing amended complaint and the matters and things therein set forth are true to the best of my knowledge, information and belief, The plaintiff, City of Jersey City, brings this action against the United States of America, the Interstate Commerce Commission (hereinafter sometimes called the Commission), and Hudson & Manhattan Railroad Company (hereinafter sometimes called the Railroad), for the purpose of enjoining, setting aside and annulling the orders of the Commission decided June 8, 1943 (attached hereto as Exhibit 2), and November 2, 1943 (attached hereto as Exhibit 7), in the proceedings entitled "Investigation and suspen-

sion Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company":

1. The jurisdiction of this Court over this action is under an' pursuant to the provisions of Section 41, subdivision (28), and Sections 43 to 48, inclusive, of Title 28 of the United States Code.

2. Plaintiff is a municipal corporation in the County of Hudson and State of New Jersey, and is a body politic. The matter covered by said order of the Commission arose in the District of New Jersey.

3. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said act.

The defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I, except those provisions which by their terms are not applicable to the interurban electric railway operated by the Hudson & Manhattan Railroad Company, and the order, hereinafter complained of, permits this railroad to increase its fares.

4. The defendant, Hudson & Manhattan Railroad Company is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey. The railroad transports passengers only, and does not transport baggage, freight or express matter.

5. The railroad properties consist of an underground rapid transit passenger railway, furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New Jersey. The railroad operates its trains in two services commonly referred to as the downtown line and the uptown line.

On the downtown line the trains operate (a) between the downtown terminal at Hudson Terminal, New York City, on the one hand, and on the other the New Jersey stations of [fol. 95] Exchange Place, Grove and Henderson Streets and Journal Square, and (b) between the downtown terminal at Hudson Terminal on the one hand, and on the other the New Jersey stations located at Exchange Place, Erie Station and Hoboken.

On the uptown line the trains operate (a) between the New Jersey stations of Hoboken on the one hand, and on the other New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the New Jersey stations at Journal Square, Grove and Henderson Streets and Erie Station, on the one hand, and on the other the New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

The railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between the downdown terminal at Hudson Terminal, New York, and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the railroad between the downtown terminal, Hudson Terminal at New York City, and the Journal Square station, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

6. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff and others in New Jersey the effectiveness of the aforesaid tariff was suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

7. After due hearing the Commission on July 11, 1938, found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight-cent fare had been justified. A fare of eight cents on the downdown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741, made three paramount findings:

(1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.

(2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

8. Following the promulgation of the report and order of July 11, 1938, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, *Hudson & M. R. Co.* v. *U. S.*, 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District [fol. 96] Court for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court for the District of New Jersey, *Hudson & M. R. C.* v. *United States*, 33 Fed. Supp. 495, which was affirmed by the Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

9. Upon petition of the railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten-cent fare on the downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing

by the Interstate Commerce Commission. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

10. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fare (referring to the eight-cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) has availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight-cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions on the interline traffic."

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an eight-cent or a nine-cent fare than for a ten-cent fare on the downtown line of respondent."

11. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the

Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine-cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare-collection boxes. In connection therewith, the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

12. The plaintiff, on July 14, 1943, replied to the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters herein alleged and thereby afford the plaintiff its right of cross examination.

[fol. 97] 13. On August 3, 1943, upon the facts as aforesaid, without according the parties further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

14. In so providing for increased fares on the downtown line whereby the regular patron or so-called commutation passenger would be required to pay nine and one-eleventh

cents per ride, and the occasional rider ten cents per ride in lieu of the nine-cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons herein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

In the original report and order of the Commission made July 11, 1938, 227 I.C.C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight-cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co. v. U. S., supra*, and affirmed by the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S., supra.* A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649 and again in its report and order of August 3, 1943.

The Commission acted arbitrarily and capriciously in permitting the railroad to increase the burden imposed upon the local downtown passenger in view of the carrier's dereliction to abide by the directive of the Commission to obtain additional revenue from increased divisions from interline traffic.

15. To the extent that the Commission permits the railroad to deliberately disregard the directive, contained in all

of the reports and orders, as aforesaid, requiring the railroad to increase its revenues through proper adjustments of interline accounting with the Pennsylvania Railroad, and in lieu thereof permits increases in the local downtown fare notwithstanding the Commission's own statement, "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers," the Commission acts arbitrarily, disregards the evidence, and transcends the authority vested in it in the administration of the Act.

16. The Commission, in authorizing local downtown fares in excess of the nine-cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged [fol. 98] carrier disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure.

17. To the extent that the Commission relegates the right of the passenger to a reasonable fare to a position subordinate to an alleged carrier disability, the Commission disregards established law, that every passenger is entitled to a reasonable fare. The carrier's disability does not justify the assessment of unreasonable fares or charges.

18. The Commission, in part, justifies the increased downtown fare by the reduction in the uptown fare from ten cents to eleven tokens for a dollar or in the alternative a ten-cent fare payable only by a dime. In so doing the Commission commits grevious error of law. A passenger is entitled to a reasonable fare over any branch or line of the service irrespective of the fares or level of fares on other services thereof.

19. In requiring the establishment of an uptown fare of eleven tokens for one dollar or in the alternative a cash fare of ten cents payable only by a dime and permitting the establishment of the same fare on the downtown line the Commission wholly and completely disregards the evidence

and facts of record by which it arrived at the conclusion that:

> "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents"

and in so doing the Commission disregards and overrules the Supreme Court of the United States, *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

20. The basic findings of the Commission in its report and order of August 3, 1943, are unsupported by any probative evidence of record. Such basic findings flow from the acceptance of the carrier contention of alleged disability. However, even assuming that the facts were properly and judiciously in evidence, they are inadequate, as a matter of law, to support the Commission's ultimate findings. A fare in excess of nine cents, theretofore found to be unreasonable does not *ipso facto* become reasonable and proper because of a carrier disability.

21. On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, having for its purpose the enjoining of the report and order of August 3, 1943. Application was made, upon filing said bill, for a temporary restraint against putting into effect said order and a statutory court was duly established to hear said application.

22. By order dated September 18, 1943, and prior to hearing of the application for a temporary restraint, the Interstate Commerce Commission reopened the instant proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto * * * the right to cross examine adverse witnesses." Such reopening was occasioned wholly by the filing of the complaint by the City of Jersey City, as aforesaid, "out of an abundance of caution," language of the Interstate Commerce Commission in its report and order dated November 2, 1943.

[fol. 99] The Interstate Commerce Commission order of reopening, dated September 18, 1943, as above described, by the terms thereof, specifically limited the scope of the rehearing wholly and solely to permit the railroad to establish such evidence of changed conditions since the previous hearings as would improve their position in the proceeding. By the same token and at the same time, the Commission's order of September 18, 1943, as defined by the trial examiner, specifically limited and precluded the other parties to the proceeding, which includes the plaintiff herein, from offering any evidence or testimony relative to changed conditions that occurred since the previous hearings which would establish the lack of need, by the railroad, for any revenue over and above that produced by the existing eight-cent local downtown fare.

23. This proceeding before the Interstate Commerce Commission was and is wholly and solely a revenue proceeding. The railroad seeks authorization to increase its existing fares for the sole purpose of providing additional revenue which it claims it needs. The railroad's position, as indicated in the decision of the Interstate Commerce Commission of June 8, 1943, is that:

> "under present fares (eight cents on the local downtown line and ten cents on the uptown line) it would be necessary for its annual traffic to increase by about 30 per cent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

The plaintiff endeavored to submit proof that the railroad's patronage had been increased by an amount in excess of 30 per cent, 1943 over 1941, and that no additional revenue was necessary or could properly be prescribed over and above that resulting from the existing eight-cent local downtown fare, but the Commission declined to receive any proof offered by the plaintiff in this regard. Moreover, if any additional revenue is needed by the railroad, which the record disputes, such revenue should be obtained through increased divisions of the interline traffic following the directives of the Interstate Commerce Commission as set forth hereinbefore.

24. To the extent that the Commission precluded the plaintiff from bringing the stale record down to date with

respect to the railroad's patronage and need for revenue, the Commission acted arbitrarily and capriciously and deprived the plaintiff of its full day in Court with respect to that reopened proceeding, and denied plaintiff due process of law under the Federal Constitution.

25. Because of the inability of the parties to the proceeding before the Interstate Commerce Commission to present testimony and evidence relative to changed circumstances and conditions, petitions for further hearing were presented by the protestants before the Interstate Commerce Commission but such petitions were denied on November 2, 1943, because the Commission stated that:

> "We have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

To the extent that the Commission prejudges and prophesies its findings that would result from a hearing not yet held the Commission acts arbitrarily, capriciously and beyond the scope of proper judicial proceeding, and is guilty of an abuse of discretion.

26. The Order of the Interstate Commerce Commission dated June 8, 1943, is in itself illegal and reflects conclusions arbitrarily made without proper support in the record, in that the Commission authorized an increase in fares from eight to nine cents predicated upon an alleged revenue need of the carrier without in effect finding that revenue was needed and that such revenue should be obtained from [fol. 100] the local downtown passengers. As a matter of fact, the Commission found that any increase in revenue should be provided by the joint interline traffic through the medium of increased divisions to the Hudson & Manhattan Railroad. Moreover, the Commission predicated its order of June 8, 1943, authorizing the increase from eight to nine cents upon the fact that it had previously authorized railroads operating in interstate commerce, parties to a proceeding before it known as *Exparte* 148, *Increased Railway Rates, Fares and Charges*, 1942, 248 I. C. C. 545, "to increase passenger fares by an amount of 10 per cent and freight rates by an amount of 6 per cent." The defendant, Hudson & Manhattan Railroad Company was named originally as a party in *Ex Parte* 148, but upon its own motion the railroad company was eliminated as a party to the pro-

ceedings and this, upon the ground that the railroad company refused to be bound by any order which the Interstate Commerce Commission might make in those proceedings predicated upon the evidence produced therein. Subsequent to the Interstate Commerce Commission decision in *Ex Parte* 148, and upon petitions filed by interested parties, the Interstate Commerce Commission found that the railroad carriers operating in interstate commerce in the United States no longer required increased revenues and that accordingly there was no justification for the maintenance of the *Ex Parte* 148, increases. Accordingly the Interstate Commerce Commission ordered the railroads to cancel from their tariffs the 6 per cent increase authorized on freight traffic. Concurrently, the Commission found that while the rail carriers offered no justification for the continuance of the 10 per cent increase on passenger fares, nevertheless, it deemed its continuance in the interest of the National Defense program in that the removal of the 10 per cent increase in passenger fares, which was no longer justified, would tend to attract and otherwise induce augmented passenger patronage to the railroads, which was not desirable, and in order to discourage any increase in transportation of passengers the Interstate Commerce Commission continued the 10 per cent increase on passenger traffic.

Notwithstanding the facts stated above, the Interstate Commerce Commission in its order of June 8, 1943, in this case predicated the increase in the railroad local downtown fare from eight to nine cents upon the statement that "an increase to that amount would be consistent with that decision," referring to the decision in *Ex Parte* 148. Such increase, however, is not consistent with that decision in that:

(a) The Hudson & Manhattan Railroad Company was not a party to the proceeding in *Ex Parte* 148;

(b) The revenue position of the Hudson & Manhattan Railroad is specifically set forth in the record in this proceeding and does not justify any increase in fares; and

(c) The record in this proceeding establishes, and all parties agree, that the traffic of the Hudson & Manhattan Railroad is predominantly that of commuters occupying a situation wholly distinct and different from

the general passenger patronage of railroads generally in the United States, and accordingly such commuter traffic cannot be treated in the light of conditions affecting railroad passenger patronage generally in the United States. Commuter traffic cannot be curtailed by levy in the form of increased and exorbitant fares.

27. Plaintiff further alleges and charges that in making its findings of November 2, 1943, wherein the Commission reiterated the findings previously made by it in its report and order of August 3, 1943, the Commission merely went through the motions of giving protestants its day in Court. The Commission's findings authorizing an increase in the local downtown fare to an alternative fare basis of eleven tokens for one dollar or a cash fare of one dime conditioned upon the establishment and manitenance of the same alternative fare basis on the uptown line was predicated, (1) upon the alleged inability of the railroad to collect a nine-[fol. 101] cent fare in its present coil collecting facilities, and (2) upon the fact that such alternative fare basis is the only practical method of collecting fares to be used universally on the railroad. The testimony in evidence upon which these findings were made were nebulous in character and fraught with contradictions.

The Commission in finding that it is impracticable for respondent to collect a cash fare of nine cents does so in the face of testimony and evidence of the railroad that it is physically possible so to do with the existing mechanical devices merely by removing the fare-counting mechanism presently contained in the collecting devices. The Commission entirely and completely disregards this evidence as it does also the fact that rapid transit lines throughout the country make fare collections in coin receptacles that do not have counting devices. To the extent that the Commission disregarded this evidence and testimony and refused to make any findings with respect to the railroad's ability to collect the nine-cent fare in its present mechanism it acted arbitrarily, capriciously and beyond the scope of its delegated authority, and was guilty of a gross abuse of discretion.

28. While finding that the alternative fare collection is the only practical method available to the railroad for universal application on its facilities, the Commission completely dis-

regards and discards the railroad's own testimony of record that such token arrangements cannot possibly be used on its intrastate facilities. To the extent that the Commission disregards and discards this evidence and testimony, it commits grievous error of fact and law.

29. The prescription by the Interstate Commerce Commission of a uniform scale of fares on both the uptown and downtown lines completely disregards and overrules the previous findings made by it, the Federal Courts and the United States Supreme Court on precisely the same factual situation. To this extent the Commission acted arbitrarily, capriciously and beyond the scope of its delegated authority. In so doing the Commission entirely disregarded the facts of record which portray the related services accorded to the passenger, the cost of the service to the railroad, and the value of the service to the passenger.

30. In view of all of the facts hereinbefore set forth the orders of the Commission of June 8, 1943, and November 2, 1943, were arbitrary and capricious without foundation in law, based upon errors of law, and without adequate findings or any evidence to support them and contrary to the evidence of record, and in violation of the Interstate Commerce Act, and in violation of the specific interpretations of the governing law, made by the Federal Courts, including the United States Supreme Court, and accordingly the Commission acted in so arbitrary and unreasonable a manner as to render its orders, although within the form of its delegated power, void.

31. The effectiveness of transportation fares on the downtown line in excess of the reasonable maximum fare of eight cents will create an undue and unjust burden upon the local downtown passenger in violation of the Interstate Commerce Act, and unless the enforcement, operation and execution of the Commission's orders of June 8, 1943, and November 2, 1943, are restrained will cause plaintiff and the members of its body politic great damages as aforesaid for which plaintiff has no adequate remedy at law.

32. Attached hereto and made a part hereof, as Exhibits, are the following:

Exhibit No. 1. The report and order of the Interstate Commerce Commission dated July 11, 1938, reported at 227 I. C. C. 741.

[fols. 102-170] Exhibit No. 2. The report and order of the Interstate Commerce Commission dated June 8, 1943, reported at 255 I. C. C. 649.

Exhibit No. 3. The report and order of the Interstate Commerce Commission dated August 3, 1943.

Exhibit No. 4. The petition of the Hudson & Manhattan Railroad Company dated July 8, 1943, for Reconsideration and Modification of the Findings Made by the Commission in its Report on Further Hearing.

Exhibit No. 5. Reply of Protestants dated July 14, 1943, to the petition of the Hudson & Manhattan Railroad Company dated July 8, 1943.

Exhibit No. 6. Order of the Interstate Commerce Commission, dated September 18, 1943, reopening the proceeding for further hearing and circumscribing the plaintiff's right to produce evidence.

Exhibit No. 7. The report and order of the Interstate Commerce Commission dated November 2, 1943.

(Sgd.) Arthur Potterton.

Sworn and subscribed to before me at Jersey City this November 15, 1943. (Sgd.) Ann G. Hogan, Notary Public of New Jersey.

[fol. 171] In the United States District Court

[Title omitted]

Notice of Motion for Leave to File and Serve Petition (Complaint)—Filed November 19, 1943

To: the Attorney General of the United States, at Washington, D. C., and Hon. Charles M. Phillips, United States Attorney for the District of New Jersey, Attorneys for United States of America;

Daniel W. Knowlton, Esq., Chief Counsel and E. M. Reidy, Assistant Chief Counsel, Attorneys for Interstate Commission;

Collins & Corbin, Esqs., John Finerty, Esq., and John E. Buck, Esq., Attorneys for Hudson & Manhattan Railroad Company;

Charles A. Rooney, Esq., Attorney for City of Jersey City.

SIRS:

Please Take Notice, that the undersigned will move this Court on behalf of the intervenors, Office of Price Administration and Director of Economic Stabilization, on the 19th day of November, 1943, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court Room of the United States District Court for the District of New Jersey, Post Office Building, Newark, New Jersey, upon the complaint filed herein and upon all proceedings heretofore had herein for an order granting leave to intervenors to file and serve the annexed petition (complaint), and for such other and further relief as to this Court may be just and proper in the premises.

Respectfully submitted, Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration. Henry Hart, Jr., Acting General [fol. 172] Counsel. David F. Cavers, Assistant General Counsel; Harry R. Booth, Utilities Counsel; Robert S. Keebler, Attorney, Office of Price Administration, Washington, D. C.

Nathan L. Jacobs, District Enforcement Attorney, Newark Office of Price Administration.

[fol. 173] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF FRED M. VINSON, DIRECTOR OF THE OFFICE OF ECONOMIC STABILIZATION, BY CHESTER BOWLES, PRICE ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, FOR LEAVE TO INTERVENE, FOR AN INTERLOCUTORY INJUNCTION AND FOR OTHER RELIEF—Filed November 19, 1943

Comes Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration, and petitions the court that he be granted leave to intervene and become a party to the proceeding under the amended and Supplemental Complaint filed by the plaintiff herein; and in this connection your petitioner shows that:

1. By virtue of Executive Order No. 9250 issued October 3, 1942, the Director of the Office of Economic Stabilization

is the agency designated by the President to receive notice of any increase in the rates or charges of common carriers or other utilities, pursuant to the Emergency Price Control Act of January 30, 1942, as amended October 2, 1942 (Public Laws 421 and 729, 77th Congress, 2nd Session); and your petitioner Fred M. Vinson is the duly appointed and acting Director of said Office of Economic Stabilization.

2. By Directive No. 1 issued by the Economic Stabilization Director on October 14, 1942, the Price Administrator of the Office of Price Administration was designated as the representative of said Director to receive notices of increases in common carrier or other public utility rates and charges, with authority to intervene and participate in proceedings before Federal, State and municipal authorities in connection with proposed increases in such rates and charges; and the said Chester Bowles is the duly appointed and acting Price Administrator of said Office of Price Administration.

3. Said Price Control Act (as amended) was enacted pursuant to the war power of the federal government, and [fol. 174] provides that prices, wages and salaries shall be stabilized so far as practicable on the basis of the levels which existed on September 15, 1942, with adjustments only to the extent necessary to aid in the effective prosecution of the war or to correct gross inequities; that such policy is imperative in order to safeguard the national economy against the devastating effects of inflation during the war emergency, when employment and consumer purchasing power are at unprecedented levels and when the available supply of consumers' goods is drastically curtailed; that, in the application of said policy, price increases, however justifiable if viewed apart from their effect upon our national economy, may not be authorized during this critical emergency unless required to further the war effort or to correct gross inequities.

4. Pursuant to the aforesaid policy of the Congress the Price Administrator has fixed the prices of commodities essential to the life and welfare of our people, has stabilized rents, and has rationed scarce and vital commodities; that such steps have been necessary war measures despite the fact that sacrifices and hardships have resulted in many cases.

5. In stabilizing common carrier and other public utility rates and charges at September 15, 1942 levels by prohibit-

ing all general increases in such rates and charges unless and until 30 days' notice had been given to the President's designee and his timely intervention to protest such increases consented to, Congress intended that the existing regulatory agencies would carry out the stabilization program in the public utility and common carrier fields, that no increases would be made contrary to or without full effect to the stabilization legislation and policies.

6. The aforesaid Executive Order No. 9250, issued by the President on October 3, 1942, requires that all government departments shall cooperate in the execution of the stabilization policy enacted by the Congress on October 2, 1942; said order stating in part:

> The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

Subsequently on April 8, 1943 the President issued Executive Order No. 9328, in which he directed the responsible [fol. 175] agencies of the government to take immediate and urgent steps "to prevent increases in wages, salaries, prices and profits, which, however justifiable if viewed apart from their effect upon the economy, tend to undermine the basis of stabilization." Said order states in part:

> The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down

the cost of living and effectuate the purposes of the stabilization program.

7. The Interstate Commerce Commission in the instant proceeding relating to the petition of the Hudson and Manhattan Railroad Company to make a general increase in its downtown fare from 8 to 10 cents, was under a legal duty, both under its own statute and under the Act of October 2, 1942 to give full force and effect to the government's stabilization program and to deny any rate increase over and above the rate, fares and charges in effect on September 15, 1942, unless it clearly appeared that such increase was necessary after giving full and complete consideration to the improvement in the company's operations, revenues and income as a result of the war and the restrictions imposed on competitive forms of transportation.

8. Pursuant to the aforesaid Act of October 2, 1942, and procedural regulations thereunder, the defendant Hudson & Manhattan Railroad Company under date of November 9, 1942, served formal notice on your petitioner of its application pending before the Interstate Commerce Commission under "Investigation and Suspension Docket No. 4394" for authorization of a 10-cent fare on its downtown line between Hudson Terminal, New York, New York, and Jersey City and Hoboken, New Jersey, and consented to his timely intervention and in such proceeding.

Your petitioner intervened as a protestant in said proceeding, filing a written brief and participating in the oral agreement in opposition to any increase in the existing 8-cent fare, on the ground that such increase would be inflationary and in violation of the standards imposed by the Interstate Commerce Act and the national policy of economic stabilization; notwithstanding which, the Commission on June 8, 1943, made its report and order authorizing said carrier to increase its downtown fare from 8 to 9 cents.

9. Your petitioner likewise participated in the supple- [fol. 176] mental proceeding arising out of the carrier's petition filed July 8, 1943, for "reconsideration and modification" of the Commission's June 8 order, wherein the carrier sought authorization to substitute a uniform cash fare of 10 cents and an alternative token fare (on the basis of eleven tokens for one dollar), in lieu of the authorized 9-cent downtown fare and the 10-cent uptown fare, on the ground that

physical limitations of the fare collection boxes used by said carrier made it impossible to collect and count a 9-cent cash fare on the downtown line without causing serious public inconvenience through stoppages and detentions of passengers.

In his answer filed July 19, 1943, to the carrier's supplemental petition aforesaid, your petitioner opposed the proposed modification in rates on the ground that such modification would result in additional inflation, and your petitioner requested that the Commission reconsider its June 8 order and restore the downtown fare to the 8-cent level, stating:

> In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living.

Your petitioner further opposed entry of a supplemental order by the Commission modifying its June 8 order as proposed, unless after notice and hearing, in conformity with the requirements of due process of law.

10. Upon the entry by the Commission on August 3, 1943, of a supplemental report and order authorizing the further increase in the downtown fare as proposed in the carrier's aforesaid petition, your petitioner was prepared to file an intervening petition in the proceeding instituted upon the Original Complaint of the plaintiff City of Jersey City herein; but refrained from doing so when the Commission on September 18, 1943, issued an order reopening the proceeding before it for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modification made by the Commission in its report of August 3, 1943."

Your petitioner excepted to the restrictions and limitations imposed by the Commission's aforesaid order for supplemental hearing, insisting at the outset of the hearing and repeatedly throughout the hearing that same should be broad enough to include evidence of the carrier's revenues, expenses and earnings since the closing of the original hearing in the proceeding.

Your petitioner further excepted to the arbitrary interpretation given by the trial examiner to the Commission's [fol. 177] order of September 18 reopening the hearing, who refused to receive any testimony with respect to the carrier's revenue except testimony relating strictly to the difference in revenue resulting from the authorized cash fares, on the one hand, and the combination cash and token fares, on the other.

Attached hereto as Exhibit A and made a part hereof are excerpts from the record of said supplemental hearing showing the narrow scope of said hearing and the restrictive rulings of the examiner, under which your petitioner was denied a full and fair hearing, as is required by said Act of October 2, 1942.

Attached hereto as Exhibit B and made a part hereof is a "Condensed Income Statement" of said carrier covering the months of July 1942 and July 1943 and the first seven months of 1942 and 1943, respectively; which exhibit was excluded from the record and which demonstrates not only the rapidly improving financial position of the carrier, even after all of its alleged operating expenses, but also that at the existing 8 cent fare the company is earning more than the Commission anticipated the carrier would at the 9 cent fare in its order of June 8, 1943. The exhibit also proves that had the entirely unwarranted $20,000 per month self-insurance cost been eliminated, the carrier would earn at the existing 8 cent fare far in excess of *all* interest charges, a condition not anticipated at the 9 cent fare, by the Commission in said order.

11. Even on the basis of the evidence contained in the record of supplemental hearing, improperly restricted as it was, your petitioner showed:

(a) That the number of revenue passengers has increased from 65,847,289 in 1941 (Ex. No. 5-R, sheet 1) to 83,500,000 based on evidence submitted by the Company (estimated on the basis of 8 months' operations) in 1943 (R. 2214).

(b) That no diversion of passengers is expected by the Company as a result of the increased fares, because of prevailing war conditions (R. 2055).

(c) That the carrier's estimate that 90 percent of its passengers will use the token fares is grossly excessive; and on

the basis of the only probative evidence in the record, the ATA Study,[1] a token utilization of 38.8%±2.8% can be expected in over 95 out of 100 instances, under the token system proposed by the company. Also, a spot check to bring the ATA Study to date, indicates that the ATA Study applies to the carrier under current conditions. A simple calculation, based on facts in the record will show that unless 74% or more of all of the passengers purchase tokens, the carrier will derive a financial advantage by [fol. 178] the substitution of the cash and token fare system for the previously authorized 9 cent fare. The Commission's calculation of a possible 79% token utilization (Order Sheet 7) is the result of errors in arithmetical calculation, and has no support whatever in the record.

(d) That the carrier has been guilty of laches in failing to prosecute its just claim against the Pennsylvania Railroad Company for a more equitable reapportionment of interline fares, to which reapportionment the Commission itself stated in its 1938 rate order the carrier must look for additional revenue in lieu of seeking to increase its downtown fare above the 8-cent level (R. 2105-2112).

12. Because of the restrictive scope of the supplemental hearing held pursuant to the Commission's order of September 18, 1943, your petitioner on October 14, 1943, filed with the Commission a written motion for modification and amendment of said order and for the reopening of the proceeding to permit your petitioner to introduce the evidence excluded by the examiner at said supplemental hearing and such additional evidence as might be necessary in order to bring said record, now in an obsolete and stale condition and originally closed on September 19, 1942, down to date. A copy of said Motion, marked Exhibit C, is attached hereto and made a part hereof.

This motion was overruled and disallowed by the Commission in its "Second Report on Further Hearing" issued on November 2, 1943, wherein the Commission granted the petition of the carrier to substitute uniform token and cash fares on its downtown and uptown lines in lieu of the theretofore authorized cash fares.

---

[1] Committee on Fare Structures Report, American Transit Association, 1937 Proceedings, Exhibit 142.

13. Your petitioner contends that in its rulings, findings and order aforesaid the Commission denied to your petitioner the right to a full and fair hearing to which he is entitled under the Act of October 2, 1942, aforesaid and under the standards properly applicable to hearings and proceedings before said Commission.

14. Your petitioner contends that in said rulings, findings and orders the Commission acted arbitrarily, capriciously and in violation of the standards imposed by the Interstate Commerce Act and by the aforesaid Act of October 2, 1942, and orders and directives thereunder, which the Commission was obligated to follow in its determination of just and reasonable rates under the emergency now prevailing.

In addition to its denial to your petitioner of a full and fair hearing, the Commission erred as a matter of law, even on the basis of the record before it:

[fol. 179] (a) In issuing its findings and order of June 8, 1943, authorizing an increase in the defendant carrier's downtown fare from 8 to 9 cents despite the facts that said carrier's normal competitors are subject to rigid wartime restrictions and its revenues and earnings are greater than they have been at any time since 1937.

(b) In failing to give due weight to the fact that, because of the great and continuing increase in the carrier's traffic and earnings during the war period, its earnings under the 8-cent fare may reasonably be expected to exceed, during the remaining war period, the amount which the Commission found adequate and reasonable in its 1938 rate order and also in its rate order of June 8, 1943.

(c) In failing to find that the carrier's special War Damage Reserve is unjustified as an operating expense and that such amount should in fact be considered a part of the carrier's net income.

(d) In accepting the carrier's contention, contrary to the evidence and on the basis of assumptions not supported by the record and despite the fact that all evidence as to current net earnings was excluded from the record, that the carrier's proposed alternative basis of cash and token fares can be expected to yield "no greater gross or net revenues

than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible."

(e) In finding in its Second Report on November 2, 1943, that the proposed token fare will result in no increase in the average cost per passenger above the level of fares theretofore authorized, since for the majority of riders, i. e. downtown riders, the fare is increased from 9 cents to *at least* 9 1/11 cents, and up to a maximum of 10 cents. In any event, the average fare to this majority of riders is bound to be in excess of 9 1/11 cents.

(f) In finding, on the unsupported opinion of the carriers officers that only the irregular or occasional passenger will pay the 10-cent fare.

(g) In finding, despite the fact that the record contains no evidence whatever on the subject, that the 10-cent cash fare compares favorably with the charges made for similar service by railroads generally.

(h) In authorizing an increase in the downtown fare beyond the level which the traffic would bear during normal times (see *Hudson & Manhattan Railroad Company* v. *United States*, 313 U. S. 98) merely because wartime restrictions on alternative and competitive lines of transpor-[fol. 180] tation, and the increased volume of traffic due to the war, have made it possible for the carrier to exact the higher fare without diminution of business.

(i) In failing to adhere to the sound conclusion reached in its 1938 rate order, that the carrier must look for additional revenue to a reapportionment of the interline fares rather than to any increase in its downtown fare above the 8-cent level; and in ignoring and condoning the carrier's laches and derelictions in failing to prosecute its claim for such reapportionment, as directed by the Commission in said 1938 rate order.

(j) In finding that an increase in the downtown fare may be compensated by a decrease in the uptown fare; and in equalizing said fares, contrary to the Commission's uniform prior findings that the carrier's uptown and downtown fares require a rate differential in favor of the downtown fare.

(k) In holding that the effect of the increase authorized in the downtown fare upon the cost of living "will be so

slight * * * as to be negligible" thereby disregarding the inflationary effect of said increases despite the recognized principle, as established by the holding of the Emergency Court of Appeals in the Lincoln Savings Bank case (137 Fed. (2d) 228), that the accumulative effect of individual increases however small would be disastrous to stabilization.

(l) In failing to find that any increase in the carrier's downtown fare above the 8-cent level existing on September 15, 1942, is unjust and unreasonable and contrary to the stabilization policy enacted by the Congress and orders duly issued thereunder.

(m) Because the Commission's findings and order were based upon a stale record in disregard of the rapidity of economic changes brought about by the war and, in particular, in disregard of the effect of the curtailment of competitive forms of transportation caused by war measures, upon the operations, revenues, and income of the company.

15. The orders of the Commission of June 8, 1943, and November 2, 1943, are arbitrary and capricious, without foundation in law, based upon errors of law, upon erroneous statutory standards and without adequate findings or any evidence to support them and contrary to the evidence of the record and in violation of the Act of October 2 and the Interstate Commerce Act and in denial of the right of your petitioner under the Act of October 2, 1942, and the Constitution of the United States to a full and fair hearing and accordingly said orders are arbitrary, unreasonable, illegal, and void.

16. In issuing its reports and rate orders of June 8 and November 2, 1943, aforesaid, the Commission committed [fol. 181] the further errors enumerated in the Amended and Supplemental Complaint of the plaintiff filed herein, which your petitioner adopts and reiterates by reference.

17. Unless said orders of June 8, 1943, and November 2, 1943, are restrained, your petitioner will be caused great and substantial injury in the performance of their duties under the stabilization legislation.

Wherefore, your petitioner prays:

First: That this petition be heard by a three judge court at the earliest available date; and that upon a hearing thereon,

the court issue an order granting leave to your petitioner to intervene and become a party herein.

Second: That pending the final hearing of this cause, the court issue an interlocutory and permanent injunction and restraint enjoining the defendants from so much of said orders of June 8 and November 2, 1943, as permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line.

Third: That upon final hearing the court adjudge, order and decree that said orders of June 8 and November 2, 1943, insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line, are, and have at all times been, in violation of the Act of October 2, 1943, enacted by the Congress; and said orders are and have at all times been, beyond the lawful authority of said Commission, and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Fourth: That the Court grant to your petitioner such other and further relief as may be proper in the premises.

Respectfully submitted, Fred M. Vinson, Director of the Office of Economic Stabilization; By Chester Bowles, Price Administrator of the Office of Price Administration; Henry M. Hart, Jr., Acting General Counsel, David F. Cavers, Assistant General Counsel; Harry R. Booth, Utilities Counsel; Robert S. Keebler, Attorney, Office of Price Administration.

[fols 182-196] *Duly sworn to by Harry R. Booth. Jurat omitted in printing.*

* * * * * * * *

[fol. 197]

EXHIBIT "B" TO PETITION

Hudson & Manhattan Railroad Company—Condensed Income Statement [1]

	July			Seven months ended July 31		
	1943	1942	Increase or decrease	1943	1942	Increase or decrease
Gross Operating Revenue	$768,452.96	$687,531.97	$80,920.99	$5,430,759.96	$4,781,646.46	$649,113.50
Operating Expenses	548,326.92	474,724.53	73,602.39	3,857,396.15	3,245,580.75	611,815.40
Operating Income	$220,126.04	$212,807.44	$7,318.60	$1,573,363.81	$1,536,065.71	$37,298.10
Non-Operating Income	8,908.46	9,859.11	*950.65	67,113.15	73,210.15	*6,097.00
Gross Income	$229,034.50	$222,666.55	$6,367.95	$1,640,476.96	$1,609,275.86	$31,210.10
Income Charges Exclusive of Interest on Adjustment Income Bonds	138,535.90	143,928.01	*5,392.11	972,454.61	1,030,574.63	*53,120.02
Net Income Available for Interest on Adjustment Income Bonds	$90,498.60	$78,738.54	$11,760.06	$668,022.35	$578,701.23	$89,321.12
Interest on Adjustment Income Bonds Outstanding in the Hands of the Public—At 5 Percent	108,354.17	118,495.83	*10,141.66	775,804.17	829,820.83	*54,016.66
Deficit	$17,855.57	$39,757.29	*$21,901.72	[2]$107,781.82	[2]$251,119.60	$143,337.78

* Decrease.

[1] As reported by the company to the I. C. C. and without adjustment by interveners.

[2] If the War Damage Reserve charges of $20,000 per month be excluded the 1943 "Deficit" becomes a net of $32,218.18, and the 1942 7-month deficit is reduced to $111,119.60. The 1941 loss was allegedly $1,136,139; and for 1942 the loss claimed was $477,001.

[fol. 198] EXHIBIT "C" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 4394

PASSENGER FARES, HUDSON & MANHATTAN RAILROAD

Motion of Fred M. Vinson, Economic Stabilization Director, by Prentiss M. Brown, Price Administrator, Protestant herein, for Modification and Amendment of Commission's Order of September 18, and for Reopening

Now comes Fred M. Vinson, Economic Stabilization Director, by Prentiss M. Brown, Price Administrator, protestant herein, and moves for modification and amendment of the Order of the Commission entered on September 18, 1943, reopening the above-entitled proceeding, and in support thereof states:

1. On July 8, 1943, the Commission entered its report and order in the above-entitled cause approving an increase in fares for the Hudson and Manhattan Railroad on its downtown lines from 8 cents to 9 cents, said increase to remain in effect for the duration of the war and six months thereafter. On July 8, the railroad filed a petition for reconsideration and modification of the findings made by the Commission requesting permission to institute cash fare of ten cents, eleven tokens for one dollar, for both its downtown and uptown lines.

2. On July 19, 1943, your protestant filed a brief with this Commission requesting the Commission to deny the request of the company to increase its fares on its downtown lines, and to reopen the proceeding for the purpose of determining whether the improvement in the traffic, revenues, and in net earnings of said railroad since the war and as a result of conditions arising out of the war, were not so great that no increases above the existing 8-cent fares would be necessary.

3. On September 18, 1943, the Commission entered an order in the above-entitled cause which provided in part as follows:

> It is ordered, that this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness

of the modifications made by the Commission in its report of August 3, 1942, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a pro- [fol. 199] posed report be issued, nor shall there be further argument before the Commission.

4. At the beginning of the hearings, Examiner Koch, who was designated as the Examiner in the above-entitled cause, stated as follows (R. 2034-2035):

The order of the Commission of September 18, 1943, which reopened this proceeding provides, and I am now quoting:

That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943;

That wording is plain that the evidence at this further hearing must be directed solely to the propriety and lawfulness of such modifications as were made in the prior findings of the report of August 3.

Those modifications were from a finding that a nine-cent downtown fare had been justified, as made in the report of June 8, to a finding as made on August 3, that an alternative downtown fare of 11 tokens for $1 or a cash fare of a dime had been justified with the proviso that contemporaneously the same alternative basis shall be maintained on the uptown lines.

In every other respect the prior findings of June 8 were affirmed.

Therefore, this further hearing under the Commission's order is restricted to evidence bearing upon the issue of whether or not those modifications in the prior finding, which had approved the downtown fare of 9 cents, shall stand.

We are not here retrying the lawfulness of the present 9-cent fare.

Said examiner further limited the scope of the hearing (R. 2149, 2215).

5. Counsel for the Stabilization Director and the Price Administrator, protestant herein, excepted to the ruling of the Examiner limiting the scope of the hearing (R. 2035-2036).

6. At the same hearing (R. 2144, ff.) counsel sought to examine a company witness in connection with the annual charge of approximately $240,000, representing war damage reserve, to determine whether such charges were necessary or required in view of change in war conditions, but objections to such cross-examination were sustained by the Examiner (R. 2145-2225).

7. Examiner Koch refused to admit or permit to be marked for identification an exhibit showing the income and [fol. 200] expenses of the railroad upon its own figures for the first seven months of 1943 and first seven months of 1942, and offered by a witness for the protestant (R. 2446-2447).

8. Counsel for the protestant stated if given an opportunity to demonstrate by presentation of evidence at the hearing, he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year of 1943 would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase (R. 2448 ff.). Such opportunity was denied.

9. While protestant prepared and presented testimony within the narrow scope of the reopened proceeding and the limited time allowed for the preparation of such testimony, protestant's request for additional time to present and prepare such testimony was denied by said Examiner.

10. The record upon the previous hearing was closed on September 19, 1942 (R. 1928) and hence is incomplete on the effect of the war and time restrictions relating to competitive forms of transportation upon the revenue and income of the company.

11. Protestant believes that the increase in rates over and above 8 cents on the downtown lines of respondent is not necessary, that the company's earnings under the existing

fares is adequate and that the increase in fares over and above the fares in effect on September 15, 1942, is contrary to and in conflict with the national stabilization program and policies of the government and will interfere with the efforts and duties of protestants to keep down the cost of living under such legislation. The denial by the examiner of the right to introduce evidence, and the order of September 18, 1943, limiting the scope of the hearing, denies your protestant the right to a full and fair hearing to which he is entitled under the Act of October 2, c. 578, 56 Stat. 765, 50 U. S. C. (App.).

Wherefore, protestant requests the Commission to modify and amend its order of September 18, 1943, to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in [fols. 201-202] rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942.

Respectfully submitted, Fred M. Vinson, Economic Stabilization Director; Prentiss M. Brown, Price Administrator, Office of Price Administration, by George J. Burke, General Counsel; David F. Cavers, Assistant General Counsel; Harry R. Booth, Utilities Counsel.

October 14, 1943. Office of Price Administration, Washington, D. C.

Certificate of Service

I hereby certify that I have served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each of their attorneys of record.

Dated at Washington, D. C., this 14th day of October 1943.

Harry R. Booth, Utilities Counsel.

[fol. 203] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION OF ECONOMIC STABILIZATION DIRECTOR FOR LEAVE TO INTERVENE—Filed November 24, 1943

It appearing to the Court that Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, of the Office of Price Administration, having moved this Court on November 19th, 1943 by notice of motion dated the 16th day of November, 1943, for an order granting leave to said petitioners to intervene and become a party plaintiff herein; and for such other and further relief as to this Court may seem just and proper in the premises, and the motion having duly come before this Court on the 24th day of November, 1943.

Now therefore, on reading and filing the notice of motion herein, dated November 16, 1943 and the petition and exhibits thereto annexed and on proof of due and timely service thereof, and on all the pleadings and proceedings heretofore filed herein, and due consideration having been had,

It is:

Ordered, Adjudged and Decreed that the motion of the petitioners Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration for an order granting said petitioner leave to intervene herein, as a party plaintiff be and the same hereby is granted as of the 19th day of November 1943.

Thomas F. Meaney, Judge.

[fol. 204] [File endorsement omitted.]

[fol. 205] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT, HUDSON & MANHATTAN RAILROAD COMPANY, TO AMENDED COMPLAINT—Filed December 6, 1943

Hudson & Manhattan Railroad Company, one of the defendants in the above entitled suit (hereinafter called the

"Railroad Company"), for answer to the amended complaint filed therein on November 19, 1943, (hereinafter termed the "complaint"):

I. Admits the allegations of paragraph 1 of the complaint, reserving, however, the question of the plaintiff's right and authority under Section 47 of Title 28, U. S. C., or otherwise, to act as plaintiff in the bringing of this suit.

II. Admits the allegations of paragraphs 2, 3, 4, 5 and 6 of the complaint.

III. Denies the allegations of paragraph 7 of the complaint as constituting a misrepresentation of the Commission's report, findings and order of July 11, 1938 therein referred to. For the true nature of such report, findings and order, the Court is respectfully referred to the copy thereof attached to the complaint as Exhibit No. 1.

IV. Admits the allegations of paragraph 8 of the complaint.

V. Admits the allegations of paragraph 9 of the complaint but for full and complete information as to the Commission's report, findings and order of June 8, 1943 the Court is respectfully referred to the copy thereof attached to the complaint as Exhibit No. 2.

VI. Denies the allegations of paragraph 10 of the complaint as constituting a misrepresentation of the Commission's report, findings and order of June 8, 1943 with respect to the matters referred to in said paragraph. For the true nature of the Commission's report, findings and order of June 8, 1943 with respect to such matters the Court is respectfully referred to the copy thereof attached to the complaint as Exhibit No. 2.

VII. Admits the allegations of paragraph 11 of the complaint but for full and complete information as to the nature of the Railroad Company's petition referred to in said paragraph the Court is respectfully referred to the copy of the petition attached to the complaint as Exhibit No. 4.

VIII. Denies the allegations of paragraph 12 of the complaint as constituting a misrepresentation of the plaintiff's reply of July 14, 1943 to the railroad's petition therein [fol. 206] referred to. For the true nature of such reply

the Court is respectfully referred to the copy thereof attached to the complaint as Exhibit No. 5.

IX. Denies the allegations of paragraph 13 of the complaint as constituting a misrepresentation of the Commission's report, findings, and order of August 3, 1943. For the true nature of such report, findings, and order the Court is respectfully referred to the copy thereof attached to the complaint as Exhibit No. 3.

X. Denies the allegation of paragraph 14 of the complaint as constituting a misrepresentation of the Commission's reports, findings and orders therein referred to and of the decisions of the District Court of the United States for the District of New Jersey and of the United States Supreme Court also therein referred to. For the true nature of such reports, findings and orders of the Commission the Court is respectfully referred to the exhibits already specified, attached to the complaint, and for the true nature of the decisions of said courts, the Court is respectfully referred to the official reports, as cited in said paragraph.

XI. Denies the allegations of paragraphs 15 to 20, both inclusive, of the complaint.

XII. Denies the allegations of paragraph 21 of the complaint as constituting a misrepresentation of the complaint of the City of Jersey City of September 13, 1943 therein referred to, hereinafter called the "original complaint". For the true nature of such original complaint the Court is respectfully referred to a copy thereof attached to this answer as Exhibit A. The Railroad Company further denies that any application was ever made upon said original complaint for a temporary restraint against putting into effect the findings and order of the Commission of August 3, 1943 or the fares therein authorized, and denies that a statutory court was ever duly established to hear such an application, but admits that an application was made and a statutory court convened for the purpose of hearing an application for an interlocutory injunction based upon such original complaint.

XIII. Denies the allegations of paragraph 22 of the complaint as constituting a misrepresentation of the Commission's order of September 18, 1943, of the nature of the

plaintiff's application to this Court preceding said order, of the proceedings and hearing before the Examiner under said order, and of the Commission's report, findings and order of November 2, 1943. For the true nature of the Commission's order of September 18, 1943 and its report, findings and order of November 2, 1943, the Court is respectfully referred to Exhibits No. 6 and No. 7 attached to the complaint. For the true nature of the alleged application for a temporary restraint referred to in said paragraph, the Court is respectfully referred to paragraph XII of this answer. For the true nature of the proceedings and hearing before the Examiner, the Court is respectfully referred to a transcript of such proceedings and hearing offered by the plaintiff as Exhibit P-1 on the hearing of an application to this Court for an interlocutory injunction based on the complaint herein.

XIV. Denies the allegations of paragraph 23 of the complaint as constituting a misrepresentation of the nature of the proceedings before the Commission therein referred to, of the grounds upon which the Railroad Company in such proceedings sought an increase in its fares, of the report of the Interstate Commerce Commission of June 8, 1943 in this respect, and of the nature of the proof which said paragraph alleges the plaintiff sought to submit to the Commission and which proof it alleges the Commission refused to receive.

For the true nature of the proceedings before the Commission and of the grounds upon which the Railroad Company in such proceedings sought to increase its fares, the [fol. 207] Court is respectfully referred to the reports, findings and orders of the Commission in such proceedings attached, as aforesaid, to the complaint and to the transcript of the evidence, and to the exhibits in such proceedings introduced by plaintiff as Exhibit P-1 on the hearing before this Court of an application for an interlocutory injunction based on the complaint. For the true nature of the evidence which it is alleged in said paragraph the plaintiff sought to introduce before the Commission and which it is alleged the Commission declined to receive, the Court is respectfully referred to the subsequent allegations of this answer with respect thereto as contained in sub-paragraph (h) of paragraph XXII hereof.

XV. Denies the allegations of paragraph 24 of the complaint.

XVI. Denies the allegations of paragraph 25 of the complaint and particularly that the plaintiff ever presented to the Commission any petition for further hearing as therein alleged. For the true nature of the conduct of the plaintiff in this respect and the Commission's action with respect thereto, the Court is respectfully referred to subsequent allegations of this answer as contained in subparagraphs (i), (j), (k) and (l) of paragraph XXII hereof.

XVII. Denies the allegations of paragraph 26 of the complaint as constituting a misrepresentation of the report, findings and order of the Commission of June 8, 1943, of the report, findings and orders of the Commission in Ex Parte 148, Increased Railway Rates, Fares & Charges, 1942, cited in said paragraph, and of the relation of the Railroad Company to the proceedings in Ex Parte 148. For the true nature of the Commission's report, findings and order of June 8, 1943 with respect to the allegations of paragraph 26 of the complaint, the Court is respectfully referred to the copy of such report, findings and order attached to the complaint as Exhibit 2. For the true nature of the Commission's findings, reports and orders in Ex Parte 148, the Court is respectfully referred to the official reports thereof, 248 I. C. C. 545, 255 I. C. C. 357. For the true nature of the relation of the defendant Railroad Company to the proceedings in Ex Parte 148, the Court is respectfully referred to the petition of the Railroad Company of July 8, 1943 for reconsideration and modification of the Commission's findings and order of June 8, 1943, said petition being attached to the complaint as Exhibit No. 4, and to the transcript of evidence on further hearing granted on such petition introduced by plaintiff as Exhibit P-1 upon the hearing before this Court of the application for an interlocutory injunction herein.

The Railroad Company further particularly denies the allegation in paragraph 26 of the complaint that the traffic of the defendant Railroad Company is commuter or commutation traffic within the meaning of the report, findings and orders of the Interstate Commerce Commission in Ex Parte 148, or otherwise.

XVIII. Denies the allegations of paragraphs 27, 28, 29, 30 and 31 of the complaint.

XIX. Denies that the Commission's orders of June 8, 1943 and November 2, 1943, which the complaint seeks to enjoin, were made without lawful authority or arbitrarily or unjustly or without full hearing or contrary to the relevant evidence or without evidence and findings to support them.

XX. Denies all allegations of the complaint not herein expressly admitted.

For Further Answer to the Complaint the Railroad Company Alleges That:

XXI. The complaint fails to state a claim upon which relief can be granted, in that the Commission's orders of June 8, 1943 and November 2, 1943 which the complaint [fol. 208] seeks to enjoin were and are within the lawful authority of the Commission, were made after full hearing and consideration of briefs and arguments of all parties, and are fully supported by the evidence before the Commission and by the Commission's findings based on such evidence. (See Exhibits Nos. 2, 3, 6 and 7 to complaint, and Exhibit P-1 on hearing on application for an interlocutory injunction.)

XXII. The plaintiff cannot maintain such complaint or be accorded injunctive relief therein prayed because of the plaintiff's failure, before filing such complaint, to exhaust its administrative remedies before the Commission, and because of certain estoppels arising against the plaintiff by reason of certain conduct of the plaintiff, all as shown by the following facts and circumstances:

(a) The findings and order of the Commission of June 8, 1943 (Exhibit 2 to the complaint) authorized the Railroad Company to publish and charge an interstate cash fare of 9 cents between stations on the downtown line, such authority being limited to the period of the war and six months thereafter. Neither the plaintiff nor the intervenor, the Director of Economic Stabilization by the Price Administrator of the Office of Price Administration (hereinafter referred to as the intervenor), has ever filed a petition with the Commission asking rehearing. reargument or re-

consideration of this order, although Rule 101 of the General Rules of Practice of the Commission specifically provides for such petitions in connection with any decision or order of the Commission. A copy of Rule 101 is atached to this answer as Exhibit B.

On the contrary, as hereinafter more fully set out in subparagraphs (f) and (g) of this paragraph, the plaintiff, on September 13, 1943, filed in this Court its original complaint in these proceedings, a copy of which complaint is attached to this answer as Exhibit A. This complaint, both explicitly and implicitly, prayed that the Interstate Commerce Commission and the Railroad Company be enjoined from any departure from the Commission's order of June 8, 1943 authorizing a nine cent fare on the downtown line, and that the Commission's order of August 3, 1943 be enjoined only insofar as it permitted the establishment of any local interstate fare in excess of nine cents on the downtown line.

(b) The Railroad Company, on the other hand, in accordance with the provisions of Rule 101 of the Commission's Rules of Practice, filed with the Commission on July 8, 1943 a sworn petition for reconsideration and modification of the findings and order of the Commission of June 8, 1943, merely, however, insofar as necessary to permit practicable compliance with such findings and order (Exhibit 4 to the complaint). For this purpose such petition asked that the Railroad Company be permitted to publish and charge alternative interstate fares of 11 tokens for $1 or a cash fare of a dime, applicable both to the Railroad Company's downtown and uptown lines. Such petition alleged that, because of physical limitations of the fare collection boxes of the Railroad Company, which limitations could not be obviated, it was impossible for the Railroad Company to collect the cash fare of 9 cents on its downtown line authorized by the Commission's order of June 8, 1943, and that the only practicable means of substantial compliance with the terms of that order would be the authorization of the proposed alternative fares applicable to both the downtown and uptown lines of the Railroad Company. The petition also asked that the Commission set aside the limitation of any increased fare to the period of the war and six months thereafter, as contained in its order of June 8, 1943.

Said petition asked that any party to such proceedings who might be opposed to the granting of the petition be

required to file a verified reply thereto within ten days and that, thereupon, the Commission, upon the basis of such petition and any such reply or replies, without further hearing, forthwith determine the issues thereby presented. [fol. 209] As grounds for such procedure, the affidavit attached to the petition showed that since the effective date of the Commission's order of June 8, 1943, the Railroad Company had suffered a loss of revenue of over $1,000 a day because of its inability to make the 9 cent fare authorized by that order on the downtown line effective, and would continue to lose over $1,000 a day until such time as the proposed alternative fares should be authorized and could be made effective. The Railroad Company alleges that such procedure would be within the lawful powers of the Commission.

(c) The plaintiff and other protestants, on July 14, 1943, filed with the Commission an unverified reply to the aforesaid petition of the Railroad Company (Exhibit No. 5 of the complaint). That reply alleged, inter alia,

> "It is the position of protestants that the petition should be denied, that the effectiveness of the decision, dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by the respondent, that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied."

The Railroad Company alleges that such reply did not constitute a petition for rehearing, reargument or reconsideration of the Commission's findings or order of June 8, 1943 within the provisions of Rule 101 of the Commission's General Rules of Practice, nor otherwise comply with such rule.

The intervenor also filed a substantially similar and unverified reply to the petition of the Railroad Company.

(d) The Commission on August 3, 1943 issued its report, findings and order (Exhibit No. 3 to the complaint) based upon the Railroad Company's petition and such unverified replies, and without further hearing. In such findings and order the Commission concluded that:

> "Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justi-

fied for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line."

In such findings and order the Commission denied the petition of the Railroad Company for removal of the limitation as to the period for the application of such alternative fares and limited the application of such fares to the period of the war and six months thereafter.

(e) The Commission in its report and order of August 3, 1943 authorizing said alternative fares accorded the Railroad Company no permission to publish such fares on less than the statutory notice of thirty (30) days provided by Section 6 (3) of the Interstate Commerce Act, Title 49, U. S. C. Although ample opportunity was thus afforded the plaintiff and the intervenor to file a petition for rehearing, reargument or reconsideration of such order in accordance with the provisions of Rule 101 of the Commission's General Rules of Practice, neither the plaintiff nor the intervenor filed any such petition.

(f) On September 13, 1943, the plaintiff filed the original complaint in these proceedings, which complaint asked that the Commission's order of August 3, 1943 be enjoined only in so far as it permitted the establishment of any local interstate fare in excess of 9 cents on the downtown line, [fol. 210] which was the fare authorized by the Commission's order of June 8, 1943. Such complaint alleged, by Paragraph 17, as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

"17. It is apparent that the Commission, in authorizing local downtown fares in excess of the nine cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I.C.C. 649, does so wholly because of an alleged carrier disability. As to

such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure."

(g) To meet such fundamental objection made by the plaintiff in its original complaint herein of September 13, 1943 as to the Commission's order of August 3, 1943, and despite the fact that the plaintiff had not exhausted its administrative remedies before the Commission with relation to such order, the Commission entered an order on September 18, 1943 (Exhibit No. 6 to the complaint) providing that the proceeding before the Commission be reopened—

"for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission."

Such order also provided further hearing thereunder on September 28, 1943.

The foregoing order was subsequently modified on such further hearing to the extent of permitting all parties the alternative right of oral argument before the Examiner or of filing of briefs with the Commission (Exhibit P-1 on hearing for an interlocutory injunction).

In the Commission's report, findings and order of November 2, 1943 (Exhibit No. 7 to the complaint, p. 71-72), the Commission made the following statement, with respect to the original complaint herein and the Commission's action based thereon:

"On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court

for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been 'deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *.' Accordingly, out of an abundance of caution, by order of September 18, 1943, we reopened this proceeding for further hearing 'to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943,' and to afford 'any party hereto * * * the right to cross-examine adverse witnesses.' Such further hearing has been held, and upon the filing of briefs the matter has been submitted for our further decision."

(h) On such further hearing of September 28, 1943 the Railroad Company offered evidence showing that by reason of the physical limitations of its fare collection boxes, which [fol. 211] limitations could not be obviated, it was impossible to collect a 9-cent cash fare on its downtown line, and that the only practicable method of substantial compliance with the Commission's order of June 8, 1943 prescribing a 9-cent fare on that line, would be by means of alternative fares of 11 tokens for $1 or a cash fare of a dime applicable both to the downtown line and the uptown line of the Railroad Company (Plaintiff's Exhibit P-1 on hearing of application for interlocutory injunction).

The plaintiff offered no evidence whatever either in this respect or within the limitations of the Commission's order of reopening of September 18, 1943. (*Id.*)

The only evidence offered by the intervenor in this respect or within the limitations of the Commission's order of reopening of September 18, 1943 was confined solely to an effort to prove that the Railroad Company's estimate of the potential ratio of the use of token fares to cash fares by its passengers under such alternative fares was erroneous.

Both the plaintiff and the intervenor, however, endeavored to offer certain evidence and to develop by cross-examination, certain data with reference to the current

revenues and operating expenses of the Railroad Company. The examiner excluded such evidence and cross-examination as not within the scope of the Commission's order of reopening. Thereupon the plaintiff and the intervenor purported to make certain offers of proof which it was alleged would in substance show: that, because of increase of traffic, the Railroad Company under a continuance of the 8-cent fare authorized by the Commission's order of July 11, 1938 would earn revenue in excess of the revenue to which the plaintiff and intervenor claimed the Commission had intended to limit the Railroad Company under the Commission's findings and order of July 11, 1938; that the Railroad Company under a continuance of the 8-cent fare authorized by the Commission's findings and order of July 11, 1938, because of such increased traffic, would earn its full current bond interest requirements; and that, therefore, the Railroad Company was not entitled to the 9-cent fare on its downtown line authorized by the Commission's order of June 8, 1943 and should be restricted to the 8-cent fare on such line authorized by the Commission's order of July 11, 1938. The examiner rejected such offers of proof as not being within the limitations of the Commission's order of reopening of September 18, 1943 but specifically advised counsel both for the plaintiff and the intervenor that if they desired to broaden the issues beyond the limitations of the order of September 18, 1943, they had the privilege of petitioning the Commission for a modification of that order for the purpose of permitting the receipt of the rejected evidence and cross-examination. Counsel for the intervenor thereupon stated that he would immediately file such a petition. Counsel for the plaintiff made no statement in this respect. (Exhibit A to petition for intervention.)

(i) On October 14, 1943, the intervenor filed a petition for the modification of the Commission's order of September 18, 1943 (Exhibit C to petition for intervention)—

> "to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on

September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942."

The only specifications in such petition of the purpose of adducing such evidence was in paragraph 8 thereof, reading as follows:

"8. Counsel for the protestants stated if given an opportunity to demonstrate by repesentation of evidence at the hearing he would show that the earnings of the [fol. 212] company, as a result of the war, at an 8-cent fare and for the full year of 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase (R-2488 ff). Such opportunity was denied."

Such petition did not specifically ask rehearing, reargument or reconsideration of the Commission's order of June 8, 1943. Such petition, moreover, failed to comply with Rule 101(b) of the Commission's General Rules of Practice (Exhibit B to answer) in that it failed to specify the evidence it sought to adduce.

(j) On October 25, 1943, the Railroad Company replied to the intervenor's aforesaid petition of October 14, 1943. In such reply, the Railroad Company specifically called attention to the fact that the plaintiff had neither filed an independent petition for any modification of the Commission's order of September 18, 1943 so as to permit the receipt of evidence offered by the plaintiff and rejected by the examiner on the hearing under that order, nor had it joined in the petition of the intervenor, and said reply asserted that the plaintiff's failure to do any of these things was caused by the plaintiff's recognition that by filing such a petition or by joining in the petition of the intervenor the plaintiff would stultify its original complaint herein then pending without amendment before this Court and which, as heretofore alleged, asked, in substance, that the Commission and the defendant railroad be required to abide by the Commission's order of June 8, 1943 authorizing a 9-cent fare on the downtown line.

(k) By a letter dated October 25, 1943 (copy of which is attached hereto as Exhibit C), addressed to the Commission but not received by either the Commission or the Railroad

Company until October 26, 1943, counsel for plaintiff professed to "adopt and otherwise ratify the contents of the aforesaid petition as though it were our own." This letter did not comply with Rule 101(e) of the Commission's General Rules of Practice either as to form, content, or service of petitions for rehearing, reargument or reconsideration. Moreover, this letter was not written until the very day upon which, under Rule 101, the reply of the Railroad Company to the petition of the intervenor was required to be filed and was not received either by the Commission or the Railroad Company until a day later. The Railroad Company alleges that this letter was occasioned by the aforesaid assertions in the Railroad Company's reply to the petition of the intervenor and that such letter clearly constituted an attempt to circumvent the requirements of the Commission's General Rules of Practice.

(1) On November 2, 1943 the Commission made its report, findings and order (Exhibit No. 7 to the complaint). Thereby the Commission denied the intervenor's petition for reopening and modification of the Commission's order of September 18, 1943. In this connection, the Commission stated (Complaint p. 73):

> "At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of, our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening

this proceeding at this time, and the motion will therefore be overruled."

[fol. 213] The Commission did not, in such report, findings and order, refer to the plaintiff's letter since that letter, as already alleged, did not constitute a petition for rehearing, reargument or reconsideration within the provisions of the Commission's General Rules of Practice.

(m) The Railroad Company alleges that the Commission was fully warranted in stating in its report and findings of November 2, 1943 that:

"Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

The motion therein referred to was the intervenor's petition of October 14, 1943 which the intervenor improperly entitled as a motion. Such petition or motion, as already alleged, failed to specify the evidence to be adduced as required by Rule 101 (b) and amounted merely to a statement of the intervenor's conclusion as to what the Commission should determine from such unspecified evidence.

The nature of such evidence, however, is shown by Exhibit B to the intervenor's petition of intervention in this court, being a condensed income statement of the Hudson & Manhattan Railroad Company for the seven months ended July 31, 1943. The Railroad Company alleges that this condensed statement is not a statement of its income from its railroad operations, but is a consolidated statement of the Hudson & Manhattan Railroad Company's entire corporate income, including that Company's income from its Hudson Terminal office buildings, and other non-railroad operations in addition to its income from its railroad operations. As shown by the Commission's report, findings and order of August 3, 1943 (Exhibit No. 3 to the complaint, p. 51), the intervenor in his unverified reply to the Railroad Company's sworn petition for reconsideration and modification of the Commission's findings and order of June 8, 1943, set out a similar condensed income statement of the Hudson & Manhattan Railroad Company for the first five months of

1943, and the Commission rejected such statement on the ground that the results shown on such five months' statement

> "are not for the railroad operations only, but also include the operation of respondent's terminal building, and therefore are of no value to us in determining whether or not there has been any important change in the revene results from the railroad operations since the record on which the prior reports is based was closed" (pp. 51-52).

Furthermore, the only specification in such petition or motion of the purpose of such evidence was, as stated in paragraph 8 thereof, to

> "show that the earnings of the Company, as a result of the war, at an 8-cent fare and for the full year of 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943 authorizing an increase."

The Railroad Company alleges that neither in the Commission's findings or order of July 11, 1938 nor its findings or order of June 8, 1943 did the Commission make any finding as to what amount of revenues would be adequate and reasonable under the fares there authorized or undertake to limit the Railroad Company's earnings under such fares. In connection with both orders the Commission merely made certain estimates of revenue which the Railroad Company might earn under the respective fares authorized in view of the conditions existing at the time such respective orders were entered, and, in particular, in view of certain factors of diversion incident to then existing competitive forms of transportation.

[fols. 214-220] XXIII. The Railroad Company alleges that by reason of the facts set forth in paragraph XXII, the plaintiff was and is estopped from bringing or maintaining its amended complaint and was and is estopped from asking and obtaining the injunctive relief therein prayed against the Commission's findings and orders of June 8, 1943 and November 2, 1943, or either of them, and against the fares authorized by such findings and orders, or either of them, and by reason of the plaintiff's failure before filing such amended complaint to exhaust its administrative remedies before the Commission is further

barred from bringing or maintaining its amended complaint or obtaining the injunctive relief therein prayed.

The Railroad Company is ready to aver, maintain and prove, as this Honorable Court shall direct, all the foregoing allegations of its answer and therefore prays that said amended complaint be dismissed.

Collins & Corbin, by James B. Emory, a Member of said Firm, Attorneys for Hudson & Manhattan Railroad Company, Defendant, 1 Exchange Place, Jersey City, New Jersey.

John E. Buck, Thomas A. Halleran, John F. Finerty, *of Counsel.*

Duly sworn to by Walter F. Brown. Jurat omitted in printing.

[fols. 221-222] EXHIBIT "B" TO ANSWER

INTERSTATE COMMERCE COMMISSION

General Rules of Practice

Rehearing; Reargument; or Reconsideration.

Rule 101. Petitions for rehearing, reargument, or reconsideration.

(a) In General. A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(b) Rehearing or further hearing. When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) Modification of effective date. A petition under this rule seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed sea-

sonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) Reconsideration. If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) Time for filing. Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

(f) Successive petitions on same grounds, not entertained. A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.

[fol. 223] In the District Court of the United States

[Title omitted]

Answer of Interstate Commerce Commission to Amended Complaint—Filed December 1, 1943

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, for answer to the amended complaint heretofore filed in this case, answers and says:

I

Answering the allegations of paragraphs 1 to 6, inclusive, of the amended complaint, the Comimssion admits the same.

II

Answering the allegations of paragraph 7 of the amended complaint, the Commission respectfully refers the court to

its decision, reported in 227 I. C. C. 741, annexed to the amended complaint as Exhibit No. 1, for more full and complete information concerning the findings of the Commission than is contained in said paragraph.

[fol. 224]

III

Answering the allegations of paragraph 8 of the amended complaint, the Commission admits the same.

IV

Answering the allegations of paragraphs 9 and 10 of the amended complaint, the Commission respectfully refers the court to its decision of June 8, 1943, 255 I. C. C. 649, for more complete information concerning its findings than is contained in said paragraphs. The Commission's report of June 8, 1943, is attached to the amended complaint as Exhibit No. 2, to which the Commission respectfully refers the court.

V

Answering the allegations of paragraph 11 of the amended complaint, the Commission admits the filing by the railroad of the petition for reconsideration therein referred to. Said petition for reconsideration is attached to and made a part of the amended complaint as Exhibit No. 4, to which the Commission respectfully refers the court for more full and complete information concerning its contents than is contained in said paragraph.

VI

Answering the allegations of paragraph 12 of the amended complaint, the Commission admits the same but refers the court to the plaintiff's reply to the railroad's petition for reconsideration, which is attached to the amended complaint as Exhibit No. 5.

[fol. 225]

VII

Answering the allegations of paragraphs 13 and 14 of the amended complaint, the Commission respectfully refers the court to its report of August 3, 1943, for more full and complete information concerning its findings than is contained in said paragraphs. Said report of August 3, 1943, is attached to the amended complaint as Exhibit No. 3.

The Commission denies the other allegations contained in said paragraph 14.

VIII

Answering the allegations of paragraphs 15 to 20, inclusive, of the amended complaint, the Commission denies the same.

IX

Answering the allegations of paragraph 21 of the amended complaint, the Commission admits the same.

X

Answering the allegations of paragraph 22 of the amended complaint, the Commission respectfully refers the court to its order of September 18, 1943, attached to its original answer as Exhibit A, for a more full and complete description of the provisions of said order than is contained in said paragraph.

The Commission further alleges that in making and entering said order of September 18, 1943, it acted within its authority.

XI

Answering the allegations of paragraphs 23 to 31, inclusive, of the amended complaint, the Commission denies the same.

[fol. 226] XII

Answering the allegations of paragraph 32 of the amended complaint, the Commission admits that the exhibits therein referred to are true copies of such documents.

Further answering the amended complaint as a whole, the Commission alleges that in the proceedings giving rise to this suit the parties thereto, including the plaintiffs herein, were, and each of them was, accorded the full hearing provided by the Interstate Commerce Act; that in said hearing testimony and other evidence bearing upon the matters covered in its reports and orders therein referred to was submitted to the Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plain-

tiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including the plaintiffs herein, its said reports and orders; that said reports and orders included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its orders were based.

The Commission further alleges that the findings and conclusions in said reports and orders were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid. [fol. 227] The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the amended complaint herein.

The Commission further alleges that said reports and orders were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them, that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the amended complaint.

To the extent that the allegations contained in the amended complaint are in conflict with statements and findings contained in its said reports, the Commission denies the same.

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the amended complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in its said reports of July 11, 1938, June 8, 1943, August 3, 1943, and November 2, 1943, referred to and made parts of the amended complaint as Exhibits Nos. 1, 2, 3, and 7, respectively, which reports and orders are hereby referred to and made parts hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall

[fol. 228] direct, and hereby prays that said amended complaint be dismissed.

Interstate Commerce Commission. By E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

Duly sworn to by Claude R. Porter. Jurat omitted in printing.

[fol. 229] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF THE UNITED STATES TO AMENDED COMPLAINT—Filed November 24, 1943

Now comes the United States, a defendant herein, and in answer to the complaint says:

I

By motion heretofore filed in this case Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration, has sought to intervene as a plaintiff and to have the order of the Interstate Commerce Commission here involved set aside.

II

A situation is thus presented where one Government Agency is the plaintiff in this case and another Government Agency, the Interstate Commerce Commission, is the defendant in the same case. Under these circumstances, and in view of the fact that both Government agencies will have an opportunity to present their respective positions through their own counsel, it is believed only fair that the United States remain neutral in this case.

III

Accordingly, the United States neither admits nor denies any of the allegations of the amended complaint.

Robert L. Pierce, Special Assistant to the Attorney General.

Wendell Berge, Attorney General.

[fol. 230] Certificate of Service

I hereby certify that I served a copy of the above answer upon each of the following counsel in this case by mailing them a copy thereof this 22nd day of November, 1943.

Robert L. Pierce, Special Assistant to the Attorney General.

Edward M. Reidy, Esquire, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.; Charles Hershenstein, Esquire, Charles A. Rooney, Esquire, City Hall, Jersey City, New Jersey; John Finerty, Esquire, 120 Broadway, New York, N. Y.; John E. Buck, Esquire, 30 Church Street, New York, New York; Collins & Corbin, Esqs., 1 Exchange Place, Jersey City, New Jersey; Harry R. Booth, Esquire, Utilities Counsel, Office of Price Administration, Washington, D. C.

[fol. 231] In the United States District Court

[Title omitted]

Answer of Defendant, Hudson & Manhattan Railroad Company, to the Petition of Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration, for Leave to Intervene, for an Interlocutory Injunction and for Other Relief—Filed December 9, 1943

Hudson & Manhattan Railroad Company, one of the defendants in the above entitled suit (hereinafter called the "Railroad Company"), for answer to the above petition of the Director of the Office of Economic Stabilization by the Price Administrator, (hereinafter called the "intervenor"):

I. Admits the allegations of paragraphs 1 and 2 of the petition.

II. Denies the allegations of paragraphs 3, 4, 5, 6 and 7 of the petition, except as to the issuance of the executive orders referred to in paragraph 6, and as to such executive orders, alleges that, if given the construction alleged by the intervenor in paragraph 6, such orders are *ultra vires* and

void as in conflict with Section 302 (c) of the Emergency Price Control Act of January 30, 1942, 50 U. S. C. A. Sec. 942 (c), which reads:

> "• • • *Provided*, That nothing in this act shall be construed to authorize the regulation of • • • (2) rates charged by any common carrier or other public utility."

Further alleges that the only effect of the proviso to Section 1 of the Act of October 2, 1942 (50 U. S. C., Sec. 961), on the foregoing provisions of Sec. 942 (c) of the Act of January 30, 1942, is to require a common carrier to give thirty days notice to the President through such agency as he may designate of any proposed increase in the rates or charges which were in effect on September 15, 1942, and to consent to the intervention by such agency before the federal, state or municipal authority having jurisdiction to consider such increase; and that, as to increases within the jurisdiction of the Interstate Commerce Commission, the Emergency Price Control Act of 1942 does not deprive the Commission of its exclusive power and duty to determine the reasonableness and lawfulness of any such proposed increase but, at most, constitutes a declaration of public policy to be given due consideration by the Commission in determining whether it shall permit any such increase.

III. Admits the allegations of paragraph 8 of the petition but denies any inference which intervenor may intend to be drawn from the use of the word "notwithstanding" in such paragraph.

Alleges that the Price Administrator had intervened in his own behalf upon the hearing of these proceedings on September 17, 1942, preceding the enactment of the Act of October 2, 1942, but under such intervention neither offered or attempted to offer any evidence; that subsequently upon his intervention as representative of the Director of the Office of Economic Stabilization under the Act [fol. 232] of October 2, 1942 the Price Administrator, though afforded full opportunity to do so under said intervention, neither offered nor attempted to offer any evidence in these proceedings prior to the Commission's report and order of June 8, 1943, but specifically limited his activities under such intervention to the filing of the written brief and the participation in oral argument mentioned in paragraph

8 of his petition herein; and, moreover, that in his exceptions of March 3, 1943 to the Examiner's proposed report and on the oral argument before the entire Commission preceding the Commission's report, findings and order of June 8, 1943, the intervenor made the following express admission:

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

IV. Admits the filing of the Railroad Company's petition of July 8, 1943 referred to in paragraph 9 of said petition and the filing of the intervenor's answer thereto of July 19, 1943, but alleges that the allegations of such answer were subject to the express admission of the intervenor referred to in paragraph III of this answer.

V. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of the first paragraph of paragraph 10 of the petition.

Admits the allegations of the second paragraph of paragraph 10 of the petition.

Denies the remainder of said paragraph 10 and for the true nature of the matters therein referred to the Court is respectfully referred to the allegations of subparagraphs (h) and (m) of paragraph XXII of the Railroad Company's answer to the amended complaint herein, which allegations are made part of this answer.

VI. Admits the allegations of subparagraphs (a) and (b) of paragraph 11 of the petition but denies all other allegations of said paragraph, and alleges that, in any event, the matters therein referred to are evidentiary in nature, and that the weight to be accorded such alleged evidence and the conclusion to be drawn therefrom were and are within the jurisdiction of the Commission and not of this Court.

VII. Denies the allegations of paragraph 12 of the petition as constituting a misrepresentation both of the intervenor's motion of October 14, 1943 therein referred to and of the Commission's report, findings and order of November 2, 1943 therein referred to. For the true nature of such motion of October 14, 1943, the Court is respectfully referred to the copy thereof attached to the petition as Exhibit C. For the true nature of the Commission's report,

findings and order of November 2, 1943, the Court is respectfully referred to the copy thereof attached to the amended complaint herein as Exhibit 7.

For further information as to the true nature of the matters referred to in paragraph 12 of the petition the Court is respectfully referred to the allegations of subparagraphs (h), (i), (j), (l) and (m) of paragraph XXII of the Railroad Company's answer to the amended complaint herein, which allegations are made part of this answer.

VIII. Denies the allegations of paragraph 13 of the petition.

IX. Denies the allegations of paragraph 14 of the petition and alleges that the matters referred to in the subparagraphs thereof are, in any event, matters for the determination of the Commission and not of this Court.

X. Denies the allegations of paragraphs 15, 16, and 17 of the petition.

For Further Answer to the Petition, the Railroad Company Alleges that:

XI. That the intervening petition fails to state a claim upon which relief can be granted in that the Commission's orders of June 8, 1943 and November 2, 1943, which orders [fol. 233] the petition asked be enjoined, were and are within the lawful authority of the Commission, were made after full hearing and consideration of briefs and arguments of all parties, including those of the intervenor, and are fully supported by evidence before the Commission and by the Commission's findings of fact based on such evidence. (See Exhibits Nos. 2, 3, 6 and 7 of amended complaint, and Exhibit P-1 on hearing of application for an interlocutory injunction.)

XII. The intervenor cannot maintain his petition of intervention or be accorded the injunctive relief therein prayed because of the intervenor's failure, before filing his petition for intervention and other relief, to exhaust his administrative remedies before the Commission, and because of certain estoppels arising against the intervenor by reason of certain conduct of the intervenor, all as shown by the following facts and circumstances:

(a) The facts and circumstances alleged in paragraph XXII, and the subparagraphs thereto, of the

answer of the Railroad Company to the amended complaint herein, and in paragraph III of this answer, all of which facts and circumstances, as there alleged, are made part of this answer.

(b) In addition to the facts and circumstances alleged in subparagraph (a) of this paragraph, the intervenor, as appears from paragraph 10 of his petition, and from the statement of his counsel on the hearing of September 28, 1943 under the Commission's order of reopening of September 18, 1943 (Exhibit P-1, pp. 2201, 2) in substance adopted the allegations of the original complaint in these proceedings, which original complaint (Exhibit A to the Railroad Company's answer to the amended petition herein) asked no injunction against the Commission's findings and order of June 8, 1943 or against the 9 cent fare on the Railroad Company's downtown line thereby authorized but, on the contrary, asked an injunction against the Commission's findings and order of August 3, 1943 only insofar as such findings and order authorized any fare on the Railroad Company's downtown line in excess of such 9 cent fare authorized by the Commission's order of June 8, 1943.

XIII. The Railroad Company alleges that, by reason of the facts stated in paragraph XII of this answer, the intervenor was and is therefore estopped from intervening in this suit under the amended complaint herein and, equally with the plaintiff, was and is estopped from asking or obtaining the injunctive relief prayed in the petition of intervention herein against the Commission's findings and orders of June 8, 1943 and November 2, 1943, or either of them, and against the fares authorized by such findings and orders, or by either of them, and further that, by reason of the intervenor's failure before filing its intervening petition herein to exhaust its administrative remedies before the Commission, the intervenor is further barred from intervening in this suit under the amended complaint herein and from obtaining such injunctive relief prayed in its petition of intervention.

The Railroad Company is ready to aver, maintain and prove, as this Honorable Court shall direct, all the foregoing allegations of its answer and therefore asks that the

injunction relief prayed in said petition of the intervenor be denied.

Collins & Corbin, by E. A. Markley, A Member of Said Firm, Attorneys for Hudson & Manhattan Railroad Company, Defendant, 1 Exchange Place, Jersey City, New Jersey.

John E. Buck, Thomas A. Halleran, John F. Finerty, of Counsel.

[fol. 234] *Duly sworn to by Walter F. Brown. Jurat omitted in printing.*

[fol. 235] In the District Court of the United States

[Title omitted]

Answer of Interstate Commerce Commission to Intervening Petition of Economic Stabilization Director and Price Administrator—Filed December 4, 1943

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, for answer to the intervening petition of Economic Stabilization Director and the Price Administrator, heretofore filed in this case, answers and says:

I

Answering the allegations of paragraphs 1, 2, 4 and 6 of the intervening petition, the Commission for the purposes of this suit, admits the same.

II

Answering the allegations of paragraph 3 of the intervening petition, the Commission respectfully refers the court to the Price Control Act, therein referred to, for more full and complete information concerning the provisions of said Act than is contained in said paragraph.

[fol. 236] III

Answering the allegations of paragraph 5 of the intervening petition, the Commission disclaims information sufficient to form a belief with respect to the intentions of Con-

gress, except as enacted and set forth in legislation passed by the Congress.

IV

Answering the allegations of paragraph 7 of the intervening petition, the Commission avers that such allegations are conclusions of law to which it is not required to make answer, and further avers that in exercising its authority in this case as it did, the Commission did not exceed the authority duly conferred upon it.

V

Answering the allegations of paragraphs 8 and 9 of the intervening petition, the Commission, for the purposes of this suit, admits the filing with it of the documents referred to in said paragraphs, to which documents the Commission respectfully refers the court for more full and complete information.

VI

Answering the allegations of the first subparagraph of paragraph 10 of the intervening petition, the Commission disclaims information sufficient to form a belief as to the truth thereof.

Answering the allegations of the second subparagraph of paragraph 10 of the intervening petition, the Commission admits the same.

[fol. 237] Answering the allegations of the third subparagraph of paragraph 10 of the intervening petition, the Commission denies the action of either it or its trial examiner, was arbitrary or illegal in any respect.

Answering the allegations of the fourth subparagraph of paragraph 10 of the intervening petition, the Commission alleges that the extracts from the record, annexed to the intervening petition as Exhibit A, constituting, as they admittedly do, only a part of the record before it, are inadmissible in support of the allegations of said subparagraph.

Answering the allegations of the fifth subparagraph of paragraph 10 of the intervening petition, the Commission admits that Exhibit B, therein referred to, was excluded, but avers that said exclusion was based on good and sufficient reasons, and its action in so excluding said Exhibit was not illegal in any respect.

VII

Answering the allegations of subparagraphs (a), (b) and (c) of paragraph 11 of the intervening petition, the Commission avers that such allegations are evidential in nature, the weight to be accorded to such allegations being for the Commission and not for the court.

The Commission denies the allegations contained in subparagraph (d) of paragraph 11 of the intervening petition.

VIII

Answering the allegations of paragraph 12 of the intervening petition, the Commission admits the filing by the intervener of the motion (Exhibit C) therein referred to, and its denial by the Commission on November 2, 1943. Said motion is attached to and made a part of the intervening [fol. 238] petition as Exhibit C, and said report of November 2, 1943, is made a part of the amended complaint as Exhibit 7, to which the Commission respectfully refers the court for more full and complete information concerning their contents than is contained in said paragraph.

IX

Answering the allegations of paragraphs 13, 14 (and its subdivisions a-m, inclusive,) 15, 16 and 17, inclusive, of the intervening petition, the Commission denies that its reports and orders are void for the reasons set forth in said paragraphs, or for any other reason.

Further answering the intervening petition as a whole, the Commission hereby adopts and makes a part hereof, the averments of paragraph XII of its answer heretofore filed to the amended complaint of the City of Jersey City, to which reference is hereby respectfully made.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said intervening petition be dismissed.

Interstate Commerce Commission By E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 239] *Duly sworn to by Claude R. Porter. Jurat omitted in printing.*

[fol. 240] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDED ANSWER OF INTERSTATE COMMERCE COMMISSION TO AMENDED COMPLAINT OF CITY OF JERSEY CITY, ET AL., AND INTERVENING PETITION OF OFFICE OF PRICE ADMINISTRATION AND DIRECTOR OF ECONOMIC STABILIZATION.—Filed December 11, 1943

Now comes the Interstate Commerce Commission, one of the defendants in this proceeding, for further answer to the amended petition of the City of Jersey City, et al., and to the intervening petition of the Office of Price Administration and Director of Economic Stabilization, and without waiving any of the defenses set forth in the Commission's answers heretofore filed in this case, alleges and says:

The relief sought in the amended petition and intervening petition should be denied in that (1) such relief is premature, neither the petitioners nor intervening petitioners having exhausted the administrative remedies provided in cases of this kind, and (2) both the petitioners and intervening petitioners are estopped from now questioning the reasonableness of the 9-cent fare found reasonable by the Commission's report of June 8, 1943, (Exhibit No. 2 [fol. 241] to the amended petition). In support of these allegations, the Commission hereby adopts and makes a part hereof statements and allegations contained in Paragraphs XXII and XXIII of the answer heretofore filed on behalf of the defendant, Hudson & Manhattan Railroad Company, to the amended complaint in this proceeding, to which the Commission respectfully refers the court.

For the Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel.

December 13, 1943.

[fol. 242] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER F. BROWN IN OPPOSITION TO MOTION FOR INTERLOCUTORY INJUNCTION—Filed Nov. 24, 1943

WALTER F. BROWN, being first duly sworn, deposes and says:

1. I am the Chairman of the Board of Directors and President of Hudson & Manhattan Railroad Company (hereinafter sometimes referred to as the "Railroad Company"), one of the defendants named in the above-entitled suit.

2. By Report and Order of the Interstate Commerce Commission dated November 2, 1943, copies of which are annexed to the amended complaint herein marked Exhibit No. 7, the Railroad Company was authorized to establish a local interstate fare for transportation between stations on its line of railroad in New Jersey and Hudson Terminal, New York on its so-called downtown line, on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents payable by a dime, for application during the remaining period of the war and six months after its termination, provided that, contemporaneously with the establishment and maintenance of such fare on the downtown line, the same alternative basis of fare be established and maintained for local [fol. 243] interstate transportation between its stations in New Jersey and stations in New York, on the Railroad Company's so-called uptown line. Said report stated that the Railroad Company in its petition dated July 8, 1943 (Exhibit No. 4 annexed to the amended complaint herein), for modification of the findings and order of the Commission of June 8, 1943 (Exhibit No. 2 annexed to the amended complaint herein), had asked "* * * for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in Section 6(3) of the Act." Said report then further stated: "A downtown fare of 9¢ was approved by us on June 8, 1943, and in the ordinary course, if collectible, that fare would now have been in effect for about four months. Accordingly, we feel warranted in exercising the powers given to us in Section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice."

Accordingly, in its order dated November 2, 1943, the Commission authorized the Railroad Company to publish and apply the fares approved in its report dated November 2, 1943 "upon not less than 15 days' notice to the Commission and to the general public, in the manner provided in Section 6 of the Interstate Commerce Act."

3. Pursuant to the authority of the aforesaid Report and Order of the Interstate Commerce Commission, the Railroad Company on November 6, 1943 issued, published and filed in the manner prescribed by Section 6 of the Interstate Commerce Act its Local Passenger Tariff, I. C. C. No. 53, to become effective November 22, 1943, establishing the alternative token and dime fares authorized by said Report and Order.

[fol. 244] 4. By letter dated November 16, 1943 addressed by the Hon. Thomas F. Meaney, United States District Judge for the District of New Jersey, to Hon. Claude R. Porter, one of the members of the Interstate Commerce Commission, the Interstate Commerce Commission was requested to direct the Railroad Company to postpone to November 29, 1943 the effective date of said Local Passenger Tariff I. C. C. No. 53 so as to afford an opportunity for a three judge statutory court to hear and determine an application to be made by the plaintiff in this action for an injunction. The application referred to in Judge Meaney's letter is based upon the Amended Complaint now before this Court, and seeks an injunction against the establishment of a fare in excess of 8 cents on the downtown line of the Railroad Company.

5. In a letter addressed to the Railroad Company under date of November 18, 1943, signed by the Hon. Claude R. Porter of the Interstate Commerce Commission, the Railroad Company was requested to postpone the effective date of Local Passenger Tariff I. C. C. No. 53. The Railroad Company acceded to such request and under date of November 19, 1943, Supplement No. 1 to such tariff was issued, published and filed with the Interstate Commerce Commission postponing to November 29, 1943, the effective date of said tariff.

6. The fare now in effect for interstate transportation between stations on the downtown line of the Railroad

Company is 8 cents, and was authorized by the Report and Order of the Interstate Commerce Commission dated July 11, 1938 (Exhibit No. 1 annexed to the Amended Complaint herein).

The fare now in effect for interstate transportation be-
[fol. 245] tween stations in New Jersey and stations on the uptown line of the Railroad Company in New York is 10 cents, and was authorized by Report and Order of the Interstate Commerce Commission dated August 9, 1920, in proceedings entitled "Investigation and Suspension Docket No. 1172", 58 I. C. C. 270.

Exhibit No. F-150, received in evidence on the reopened hearing before the Commission on September 28 and 29, 1943, shows that, on the basis of traffic for the eight months ended August 31, 1943, adjusted to a twelve months basis, the Railroad is carrying 57,082,773 local interstate passengers, of which 38,558,898 are interstate passengers on the downtown line and 18,523,875 are interstate passengers on the uptown line.

Through inability of the Railroad Company to collect a 9-cent cash fare on the downtown line authorized by the Commission's Report and Order of June 8, 1943, the Railroad Company has lost and is continuing to lose more than $1,000 per day, and the Commission so found in its Report and Order dated August 3, 1943 (Exhibit No. 3 annexed to the Amended Complaint herein).

The postponement from November 22, 1943 to November 29, 1943 of the effective date of Local Passenger Tariff I. C. C. No. 53 publishing the alternative token and dime fares authorized by the Commission's Report and Order of November 2, 1943, similarly will cause the Railroad Company to lose approximately $1,000 a day additional revenue which such fares would provide, and any further postponement of the effective date for the application of the fares published in such tariff similarly will cause the Railroad
[fol. 246] Company to continue to lose approximately $1,000 a day. All of such losses are and will be irreparable.

7. If an interlocutory injunction is denied and this Court on final hearing should grant a permanent injunction, in the interim between such denial and such permanent injunction (a) there can be no pecuniary damage whatever to the applicant Jersey City, (b) any damage to any pas-

senger on the downtown line, including such unidentifiable passengers as may be citizens of Jersey City, will be wholly negligible, amounting to 1-1/11 cents per trip or a maximum for a daily commuter of 54-5/11 cents per month (a period within which this Court may reasonably be expected to hear and determine an application for final injunction), and (c) passengers on the uptown line, including such as may be citizens of Jersey City, will be benefited to the extent of 10/11ths of a cent a trip, or 45-5/11 cents per month in the case of daily commuters, representing the difference between the authorized token fare and the present mandatory 10-cent cash fare.

If an interlocutory injunction should be granted and this Court on final hearing should determine the authorized alternative token and dime fares to be valid, (a) the Railroad Company will suffer irreparable damage of approximately $1,000 per day, (b) the Railroad Company cannot be protected against such irreparable damage by any bond which might be given by Jersey City, and (c) irreparable damage will likewise ensue to passengers on the uptown line, including such as may be citizens of Jersey City, to the extent of 10/11ths of a cent per trip.

8. The City of Jersey City cannot furnish a valid bond [fol. 247] which would indemnify the Railroad Company against the loss of approximately $1,000 per day which the Railroad Company would sustain if the present 8-cent fare on the downtown line is continued in effect under an interlocutory injunction. Many of the passengers using the lines of the Railroad Company are either citizens and residents of the State of New York or of portions of the State of New Jersey beyond the territorial limits of the City of Jersey City, who cannot be identified from citizens and residents of the City of Jersey City. I am advised by counsel that the City of Jersey City, as a municipal corporation, would not have the power to assume the liability to the Railroad Company for additional fares which would be owing by such persons who are not citizens and residents of the City of Jersey City, and that it is at least extremely doubtful that the City of Jersey City has the right and power to assume even for its own citizens and residents their liability to the Railroad Company for the difference between the 8-cent fare and the alternative token and dime fares authorized for use on the downtown line.

9. The facts hereinafter set forth show that, should this Court deny an interlocutory injunction it would be impracticable to condition such denial upon an undertaking by the Railroad Company to refund the difference between the alternative token and dime fares on the downtown line authorized by the Commission's Order of November 2, 1943, and the present 8-cent fare on that line. In any event, as shown in paragraph 7 hereof, such refunds would be of such negligible amount that the fact it is impracticable to provide for them could result in no damage whatever to [fol. 248] the applicant and no material damage to any individual passenger, including Jersey City passengers. Moreover, the requirement of any such refund undertaking would ignore the fact that the Railroad Company would have irretrievably lost 10/11ths of a cent per trip for every passenger using tokens on the uptown line during such period, in the event a final injunction should issue.

10. The local fares presently in effect on the lines of the Railroad Company are as follows:

8 cents between stations in New Jersey and Hudson Terminal, New York, on the downtown line;
10 cents between stations in New Jersey and stations in New York on the uptown line;
5 cents between stations in New Jersey; and
5 cents between stations in New York City on the uptown line.

The Railroad Company collects all fares for local interstate and intrastate transportation on its lines by the deposit of cash in fare collection boxes at entrance gates as follows:

All eastbound passengers entering stations in New Jersey deposit 8 cents in coins in fare collection boxes at entrance gates. Passengers traveling to Hudson Terminal, New York, on the downtown line of the Railroad Company, having fully paid the present 8-cent fare, leave that station without further payment. Passengers traveling to stations on the Railroad Company's uptown line in New York City, are required to deposit 2 cents in coins in fare collection boxes at the station of exit, thereby paying the remainder of the present 10-cent fare applicable on the uptown line.

All westbound passengers entering Hudson Terminal Station, New York, deposit 8 cents in coins in the fare

collection boxes at entrance gates. All westbound passen-
[fol. 249] gers entering stations in New York City on the uptown line deposit 10 cents in coins in fare collection boxes. All such passengers, having fully paid the present interstate fares, leave destination stations in New Jersey without further payment.

New Jersey intrastate passengers are required to deposit 8 cents in coins in fare collection boxes at entrance gates and the attendants at such boxes issue to them a refund coupon which is redeemed for 3 cents when presented to agents at destination stations in New Jersey within thirty minutes from the time of issue.

New York intrastate passengers making a northbound trip between stations from Christopher Street to 33rd Street, New York, on the uptown line pay 5 cents to agents at entrance gates and pass through turnstiles which register such fares, and are issued a coupon permitting them to exit at destination station in New York without further payment. New York intrastate passengers making a southbound trip between stations from 33rd Street to Christopher Street, New York, on the uptown line, are required to deposit 10 cents in coins in the fare collection boxes, and at destination stations in New York have issued to them by the gatemen at the exits a refund coupon which is redeemed for 5 cents by the agents at such station.

[fol. 250] 11. There is no way by which the Railroad Company can determine whether a passenger entering a station in New Jersey intends to use the uptown line or the downtown line of the Railroad Company. Accordingly, it will not be possible for the Railroad Company to issue to passengers entering stations in New Jersey any form of coupon or certificate which could be redeemed in the event it is ultimately determined that the Report and Order of the Commission dated November 2, 1943, authorizing the alternative token and dime fares are illegal and invalid. In such case a passenger who had used a token and had traveled to a station on the uptown line would owe the Railroad Company 10/11ths of a cent, whereas if such a passenger had used a dime he would have paid the full 10-cent fare authorized for transportation on such line. On the other hand, if a passenger traveling to Hudson Terminal on the downtown line had used a token, it would be necessary to issue a coupon entitling such passenger

to a refund of 1-1/11ths cents, while if a passenger had used a dime it would be necessary to issue a coupon entitling such passenger to a refund of 2 cents. Therefore, at each entrance gate at all stations in New Jersey and at Hudson Terminal Station in New York it would be necessary to distinguish passengers depositing a token, who would be entitled to receive a refund coupon redeemable for 1-1/11ths of a cent, and passengers depositing a dime, who would be entitled to receive a refund coupon redeemable for 2 cents, provided that in both instances the passenger traveled between a New Jersey station and Hudson Terminal Station in New York. It would not be possible to issue to eastbound passengers entering stations in New Jersey, destined for Hudson Terminal on the downtown [fol. 251] line, any refund coupon which would be valid without further action, although in the case of a westbound local interstate passenger from Hudson Terminal, refund coupons could be issued which would not require validation. The only conceivable method of making refunds, which, however, would be wholly impractical, would be to issue to all passengers who deposited a token a coupon redeemable for 1-1/11th cents, and to issue a different coupon to all passengers who deposited a dime which coupon would be redeemable for 2 cents, and to require both classes of passengers to present such coupons for validation to attendants at Hudson Terminal when they exited at that station.

The impracticability of such a method of refunds is demonstrated by the following facts respecting train and station operations at Hudson Terminal:

Hoboken-Hudson Terminal Service: Between 6:00 A. M. and 7:00 P. M. on weekdays these trains arrive at Hudson Terminal on Tracks Nos. 1 and 2, and normally discharge passengers to station platforms 1 and 3. However, to facilitate the arrival and departure of trains during the peak traffic period in the morning, passengers also are discharged on station platform No. 2, which is the normal loading platform, so that certain stairways between such station platform and the Concourse Floor may be used by exiting passengers. There are 16 stairways between the Concourse Floor of Hudson Termiaal and station platforms Nos. 1, 2 and 3, of which 15 are used to exit passengers from station platforms to the Concourse floor during the morning peak traffic period. During the evening peak

traffic period, 4 stairways between the Concourse Floor and station platform No. 2 are used by entering passengers and [fol. 252] 11 stairways between the Concourse Floor and station platforms Nos. 1 and 3 are used by exiting passengers.

Journal Square-Hudson Terminal Service: Trains in this service as well as trains in the New York-Newark Rapid Transit service arrive at Hudson Terminal on tracks Nos. 3, 4 and 5 during the morning peak traffic period, and on tracks Nos. 3 and 4 during the evening peak traffic period. During the morning peak traffic period passengers from both of these train services are discharged on station platforms Nos. 3, 4 and 5. There are 15 stairways between station platforms Nos. 3, 4 and 5 and the Concourse Floor at Hudson Terminal and during the morning peak traffic period 2 of such stairways are used by entering passengers and 13 by exiting passengers, including 5 stairways from station platform No. 3, which also are used by exiting Hoboken-Hudson Terminal passengers.

During the peak evening traffic period 4 stairways between the Concourse Floor and Station platform No. 4 are used by entering passengers and 11 stairways between station platforms Nos. 3 and 5 are used by exiting passengers, including 5 stairways from station platform No. 3, which also are used by exiting passengers in the Hoboken-Hudson Terminal Service.

Therefore, at Hudson Terminal during the morning peak traffic period there are a total of 23 stairways used for exiting passengers in all train services; and during the evening peak traffic period there are a total of 8 stairways used by entering passengers and a total of 17 stairways used by exiting passengers in all services.

During the peak traffic periods of the morning and evening, approximately 70,000 passengers are handled [fol. 253] through Hudson Terminal Station, trains between Hudson Terminal and stations in New Jersey arrive and depart on a 90-second headway schedule, and consist of as many as seven cars.

To provide for the validation of refund coupons by passengers exiting at Hudson Terminal Station would require not less than 68 employees who would be stationed on the Concourse Floor adjacent to the top of each stairway used by exiting interstate passengers, to whom passengers would present refund coupons for date and time stamping to

validate them. It also would be necessary to obtain such date and time stamping machines and to print refund coupons.

It would not be possible for present fare collection-box attendants to watch deposit of tokens or dimes in collection boxes and at the same time issue the appropriate refund coupon, particularly as at New Jersey stations such attendants now must issue refund coupons to New Jersey intrastate passengers. The issuance of refund coupons would require approximately fifty additional employees at Hudson Terminal Station and at stations in New Jersey, and such a method would require every attendant to be certain as to whether a token or a dime had been deposited so that such attendants might issue an appropriate refund coupon.

It is estimated that the Railroad Company would require a total of approximately 118 additional employees to issue and validate refund coupons, and would incur an expense approximately $700.00 per day for additional employees, exclusive of the cost of providing and maintaining validating machines and printing refund coupons. Validating machines could not be procured under present wartime restrictions nor could appropriate forms of refund coupons [fol. 254] be printed nor the necessary additional employees be procured and trained and appropriate changes be made by the Railroad Company at its Hudson Terminal Station to install such a refund system within any period of time it could reasonably be assumed would elapse between the date when application is being made for an interlocutory injunction and a date when the Court could be able to hear and determine the application for a permanent injunction. At the present time the Railroad Company is not able to secure sufficient employees to cover the present tours of duty in the station department, by reason whereof certain employees are required to work, including overtime, in some cases for a total of as many as twelve hours a day. The Railroad Company would have no practical means of policing the proper issuance and use of refund coupons and thus would risk the loss of substantial revenue.

Any attempt that might be made to validate refund coupons on the Concourse Floor of Hudson Terminal at the top of the exit stairways would result in a hazardous condition due to congestion on stairways and station platforms which would be occasioned by the stopping of passengers to have refund coupons validated. Such congestion might

well become so great it might result in inability to discharge passengers from subsequent trains, necessitating the holding of such trains in the eastbound tunnel outside of Hudson Terminal until it was possible and safe to permit them to enter and discharge their passengers to station platforms. Such holding of trains in the tunnel would retard the movement of all trains into and out of the station, would prevent the operation of trains on the present 90-second headway schedule, would disrupt all railroad opera-
[fol. 255] tions, and would result in serious inconvenience and delay to all passengers, particularly to passengers desiring to make connections with trains of the Pennsylvania Railroad at Newark and Exchange Place, New Jersey, with trains of the Erie Railroad at Jersey City, and with trains of the Lackawanna Railroad at Hoboken.

Walter F. Brown.

Duly sworn to by Walter F. Brown. Jurat omitted in printing.

[fol. 256] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STATE OF NEW JERSEY,
County of Hudson, ss.:

AFFIDAVIT OF ARTHUR POTTERTON IN SUPPORT OF MOTION FOR INTERLOCUTORY INJUNCTION—Filed November 26, 1943

ARTHUR POTTERTON of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Director of Revenue and Finance of Jersey City and also the Acting Mayor of Jersey City, and am fully acquainted with the matters involved in this litigation from my own knowledge. I have been a public official of Jersey City for many years and am peculiarly acquainted with the financial problems of the city, real estate values, and all of the factors which directly and indirectly affect the business and financial interests of the inhabitants of our city.

2. I have read the affidavit of Walter F. Brown submitted in opposition to the motion for interlocutory injunction applied for by the City of Jersey City.

3. Specifically replying thereto, I deny the statement made in said affidavit and contained in paragraph numbered 7 thereof, wherein it is stated that "if an interlocutory injunction is denied and this court on final hearing should grant a permanent injunction, in the interim between such denial and such permanent injunction (a) there can be no pecuniary damage whatever to the applicant, Jersey City."

[fol. 257] 4. The facts are that the areas of Jersey City in and around Journal Square and Grove Street of the Hudson & Manhattan Railroad in Jersey City have many retail establishments which compete, for their existence, with retail establishments located in New York City and elsewhere. Their existence is dependent, to a considerable extent, upon the number of persons utilizing the facilities of the Hudson & Manhattan Railroad, who consequently pass the vicinity of these business establishments and accordingly patronize them. Any diminution of the Hudson & Manhattan patronage precipitated by the establishment and effectiveness of excessive and unreasonable fares will materially affect the continued existence of these retail establishments. To the extent that the maintenance of industry and commerce is essential to the welfare of Jersey City, as obviously it is, and as has been recognized by the New Jersey Legislature (R. S. 40:48-1), giving municipalities the right to appropriate funds for advertising its advantages, the irreparable damage to the property rights of the retail dealers becomes the irreparable damage of the City of Jersey City.

5. The effectuation of the increased fare will lead to a substantial diminution of the number of persons using the facilities of the Railroad Company, a consequent serious decrease in the number of persons trading with business establishments throughout the city, and particularly those in the immediate vicinity of the termini of the Railroad Company in the city, a lessening of property values with its attendant serious effect upon municipal ratables, increases in the tax rates, and thereby an increase in the burden of the cost of government upon the remainder of the population in the city. Further, an inevitable loss of industry will ensue upon the competitive disadvantages of Jersey City's business and industry in the labor market. This is a particularly acute problem at the present time because of the [fol. 258] tightness of the labor market and any newly created deterioration of the labor market available to the

City of Jersey City and its industries will, therefore, find an immediate reaction in the departure of industries and businesses which require such labor.

6. The City of Jersey City is in sharp competition with surrounding territories on both sides of the Hudson River for home owners, rent payers, and industries. Transportation facilities and the cost thereof is of tremendous importance with respect hereto.

7. The interests of the City of Jersey City in respects which are plainly the proper and legitimate concern of the city, are seriously, gravely and irreparably affected in a pecuniary sense by the imminence of the proposed change of rate.

8. It is obvious that the pecuniary interests of the City are not to be determined upon the same basis as one would judge the pecuniary interests of a private corporation. The city is not a commercial organization geared to make a profit. The pecuniary interests of the city are those of its inhabitants, workers and industries, and anything which directly and inevitably affects their pecuniary interests, necessarily, and in the same sense, affects those of the city. If there were any doubt as to this, the Legislature of New Jersey has completely dispelled it by its indication in R. S. 40:48-1, that every municipality has the right to appropriate moneys to advertise the advantages of the city. This is plainly a recognition that the commercial advantages and interests of its inhabitants are the direct concern of the municipality itself.

9. I have testified in the proceedings which came within the order of the Interstate Commerce Commission bearing [fol. 259] date July 11, 1938. Commissioner Eggers testified in the proceedings which culminated in the order of August 8, 1943. In both of these proceedings our testimony established that the City of Jersey City would suffer irreparable damage from the increase in fare to ten cents. I reiterate what I have testified in the former proceedings. The ten cents fare on the downtown line of the Hudson & Manhattan Railroad would work havoc with our ratables; real estate would become depreciated; our people would move from their homes and seek places where they could get cheaper transportation to and from their work; and the

people of our city, as well as the municipality, would suffer untold damage if a ten cents rate would be permitted.

Arthur Potterton.

Duly sworn to by Arthur Potterton. Jurat omitted in printing.

[fol. 260] In the District Court of the United States
City of Jersey City, Plaintiff,

and

Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, Intervenor,

v.

United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, Defendants

Per Curiam Opinion on Interlocutory Injunction—Filed December 1, 1943

Appearances:

Charles E. Hershenstein, Esq., Charles A. Rooney, Esq., S. S. Eisen, Esq., Attorneys for City of Jersey City; Edward M. Reidy, Esq., Attorney for Interstate Commerce Commission; Collins & Corbin, Esqs., by James B. Emery, Esq., John J. Finnerty, Esq., Thomas A. Hal'oran, Esq., John E. Buck, Esq., Attorneys for Hudson & Manhattan Railroad Company; Harry R. Booth, Esq., Attorney for Office of Economic Stabilization, by Chester Bowles, Price Administrator.

McLaughlin, Circuit Judge and Fake and Meaney, District Judges:

It appears upon the face of the record that after hearing and argument a certain order was entered by the Interstate [fol. 261] Commerce Commission on June 8, 1943, fixing and establishing certain passenger rates or tariffs on the line of the Hudson & Manhattan Railroad Company between the City of Jersey City and the City of New York, and thereafter, on November 2, 1943, the Commission, for reasons which appear in the record, increased the said rates or

tariffs. It is argued here that both these orders should be enjoined, laying emphasis upon the latter because neither the City of Jersey City nor the Office of Price Administration, which intervened in this proceeding, was afforded an opportunity to cross examine on the evidence adduced relating to the subject dealt with, and that they were precluded from introducing evidence to meet the issues raised. The Commission's order permits the increase of rates or tariffs to become effective on Monday, November 29, 1943, and we have this day, Friday, November 26, 1943, received briefs and entertained oral arguments covering the issues raised, thus being forced to take action on extremely short notice.

Relating to the rights of the Office of Price Administration, we find the following:

1. It is entitled to intervene herein pursuant to statute. It has done so.

2. It has an interest in that it is charged with the duty of enforcing the stabilization of prices in this critical war period.

3. The consideration of passenger rates is within the sphere of its authority to appear herein, and it has an interest in the rates to the extent that they may affect stabilization.

4. The rights of the Office of Price Administration cannot [fol. 262] exhaustively be gone into by this Court in the short space of time between Friday and Monday.

Relating to the rights of Jersey City, it is found:

1. The City of Jersey City is a proper party to these proceedings and has a right to appear and defend, and has acquired a standing as a party before the Interstate Commerce Commission.

2. The City is authorized by law to raise by taxation and spend money so raised to advertise the City as a desirable place in which to locate industries and residences. The exercise of this right is decreased in value by the increase of rates herein complained of.

It is the opinion of the Court that injunctive relief should be offered in this cause, staying the operation of the rates

and tariffs established as aforesaid and maintaining the status quo ante to the end that a full and complete hearing may be afforded all parties before the said rates and tariffs shall take effect. An interlocutory injunction will therefore be issued, staying the force and effect of the two orders hereinbefore referred to for a period of fifty days hereafter, and the cause is hereby set down for final hearing on the 4th day of January, 1944.

With reference to the necessity of the municipal plaintiff being required to give a bond, as we see it, there is no obligation on the part of such branch of Government to furnish a bond in this proceeding.

[fol. 263] IN THE DISTRICT COURT OF THE UNITED STATES

CITY OF JERSEY CITY, Plaintiff,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, Intervenor,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HUDSON & MANHATTAN RAILROAD COMPANY, Defendants

FINDINGS AND INTERLOCUTORY INJUNCTION—November 26, 1943

This matter coming on to be heard before a statutory court consisting of Honorable Gerald McLaughlin, Judge of the Circuit Court, and Honorable Guy L. Fake and Honorable Thomas F. Meaney, Judges of the District Court, upon the application of the plaintiffs to enjoin *pendente lite* the orders of the Interstate Commerce Commission bearing dates of June 8, 1943, and November 2, 1943, in the presence of Charles Hershenstein, Charles Rooney and S. S. Eisen appearing for the plaintiff, City of Jersey City, Harry R. Booth appearing for Economic Stabilization Director Vinson and Price Administrator Bowles, intervening plaintiff and John Finerty and John Buck appearing for the Hudson & Manhattan Railroad Company, and E. M. Reidy appear-
[fol. 264] ing for the Interstate Commerce Commission,

defendants, and the Court having heard the argument of counsel and considered the briefs, being of the opinion that;

(1) The plaintiffs, City of Jersey City and the Director are proper parties to bring and maintain this proceeding as plaintiffs herein.

(2) That under the Interstate Commerce Act and Acts amendatory thereof, and supplementary thereto, the Interstate Commerce Commission was and is required to afford all parties properly before it a fair and full hearing.

(3) That the City of Jersey City and the Director properly appeared as protesting parties before the said Interstate Commerce Commission and were and are entitled to the aforesaid full and fair hearing.

(4) In addition to the above, the Director, representative of the President, under the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), intervened in said proceedings with the consent of the railroad company, defendant herein, as required by law, for the purpose of preventing an increase in the fares of said railroad to the extent that such fares would conflict with the stabilization legislation enacted by Congress, to aid in the prosecution of the War, and under said legislation the Director was entitled to a fair and full hearing.

(5) That the pleadings and the argument herein and the record before the Interstate Commerce Commission discloses that neither said City of Jersey City nor said Director, jointly or individually, was afforded a full and fair hearing by the said Commission, in that they were individually and jointly denied the opportunity to present evidence and testimony, including the right to cross-examine witnesses on material matters of a probative nature bearing upon the right of the said railroad to an increase in its fares over and above those in effect on September 15, 1942, under the said Interstate Commerce Act, Acts amendatory thereof and supplementary thereto, and the said Act of October 2, 1942.

(6) That the national interest requires that the fares of the said railroad be maintained as currently in effect,

which present fares are the same as those in effect on September 15, 1942, pending final hearing of this cause.

(7) That irreparable damage to the said City of Jersey City and the said Director will result if the reports and orders of the Interstate Commerce Commission dated June 8, 1943, and November 2, 1943, in this proceeding, are not temporarily restrained and enjoined.

[fols. 265-284] Now Therefore, good cause appearing therefor,

It is on this 26 day of November, 1943, Ordered that the defendants, The United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, be, and they are hereby restrained and enjoined, pending the final hearing in the proceeding entitled above for a period of fifty days from the date of this order, and until the further order of the Court, from putting into effect the report and orders of the Interstate Commerce Commission bearing date June 8, 1943, and November 2, 1943, in so far as such orders permit the establishment of any local interstate fare in excess of 8 cents for transportation on the downtown line of defendant, Hudson & Manhattan Railroad Company.

It is further ordered that final hearing in this cause will be had December 14, 1943, at 10:30 o'clock in the forenoon at the Post Office Building, Newark, N. J.

(S.) Gerald McLaughlin, Guy L. Fake, Thomas F. Meaney.

[fol. 285] In the United States District Court

[Title omitted]

Transcript of Hearing on Application for Permanent Injunction

Newark, N. J., Tuesday, December 14, 1943.

Before Hon. Gerald McLaughlin, U. S. C. J., Hon. Guy L. Fake, and Hon. Thomas F. Meaney, U. S. D. J.

Appearances: Charles E. Rooney, Esq., Charles A. Hershenstein, Esq., S. S. Eisen, Esq., For the Plaintiff; Charles A. Stanziale, Esq., Paul Mulcahy, Esq., For the United

States of America; Harry R. Booth, Esq., Utilities Counsel, representing Economic Stabilization Director, Fred M. Vinson, and Price Administrator Chester Bowles, as intervening plaintiffs. Edward M. Reidy, Esq., For the Interstate [fol. 286] Commerce Commission. John E. Buck, Esq., Thomas A. Halloren, Esq., John A. Finerty, Esq., James B. Emery, Esq., For the defendant, Hudson & Manhattan Railroad Company.

OPENING STATEMENT

Mr. Hershenstein: May it please your Honors, this is the final hearing upon the complaint filed by Jersey City, in which complaint the Director of Economic Stabilization and the Office of Price Administrator intervened, for a final injunction against the Interstate Commerce Commission and the Hudson & Manhattan from establishing the increased fares permitted under the orders of the Interstate Commerce Commission bearing date June 8, 1943 and November 2, 1943.

May I at the outset direct your Honors' attention to the fact that paragraph 2 of the complaint of Jersey City, namely, that plaintiff is a municipal corporation in the County of Hudson and State of New Jersey, and is a body politic, has been admitted in the answers both of the Interstate Commerce Commission and the railroad.

Counsel for the railroad and the Interstate Commerce [fol. 287] Commission have also agreed and consented that the orders annexed to our bill of complaint are true copies of the orders and determinations of the Interstate Commerce Commission, and may be offered in evidence with the same probative value as if the originals or certified copies of the orders had been produced upon this, the final hearing.

I understand that's correct.

Mr. Finerty: That is correct.

Mr. Hershenstein: May I also direct your Honors' attention to the record which has been submitted here in these proceedings, and may I ask, if your Honors please, that the record be marked P-1? We have referred to the record as P-1 in our briefs. It has not been marked at the previous hearing.

Judge McLaughlin: Is it complete now? Is the record complete?

Mr. Hershenstein: The record which we submitted to the clerk here of all the prior proceedings pending before the Interstate Commerce Commission.

Judge McLaughlin: All right, let it be marked.

Mr. Finerty: May it please the Court,—Mr. Hershenstein, I am not certain that the record is complete.

Mr Hershenstein: Yes, it is complete.

[fol. 288] Mr. Finerty: Is it?

Mr. Booth: No, I was going to suggest to the Court that we have not been able to check the record that's been filed with the Court. It may be a few exhibits are missing. We would like to reserve the right, with the permission of the Court and the permission of the parties, unless there is some objection here, to again check the exhibits and the transcript that have been filed, if we might be given five days or a week to do it, and then supply whatever deficiency in the record there might possibly be. I have been in Washington since the day of the last session of the court here and we haven't had——

Judge McLaughlin: Well, Mr. Booth, I think that ought to be done as quickly as possible. I don't know whether everybody needs five days to check the record.

Mr. Booth: It isn't five days to check it; it is five days including the time to check it and to get up the exhibits that might be missing. Some of them may have to be typed. We could probably check it today or tomorrow.

Judge McLaughlin: Well, suppose we mark it in evidence subject to the check by both sides. You say five days.

Mr. Booth: Well, I suggest——

[fol. 289] Judge McLaughlin: What do you say, Mr. Finerty?

Mr. Finerty: I see no reason why the exhibits can't be supplied immediately. I certainly would undertake to supply any missing, on our part, today.

Mr. Eisen: Well, we have all of ours in New York, Mr. Finerty. If you will undertake to do that, I think we can bring the record up to date today.

Mr. Finerty: Yes.

Judge McLaughlin: Before the hearing is closed.

Mr. Booth: Yes, sir, during the lunch recess.

Judge McLaughlin: Then suppose we hold off the actual marking. It could be marked for identification.

Mr. Finerty: Well, I don't understand that even when that is done and all the exhibits are supplied, it forms the

record, your Honor. I understand it is the transcript of the hearings.

Judge McLaughlin: That's what I understand.

Mr. Finerty: And the exhibits filed on the hearings, but does not represent the record before the Commission.

Mr. Eisen: It doesn't contain the pleadings.

Mr. Finerty: That's right; or the orders of the Commission.

Mr. Eisen: Well, the orders of the Commission are attached to our bill of complaint.

[fol. 290] Mr. Finerty: Certain of them are. There are certain other orders that are not attached; for instance, the order permitting the intervention of the OPA, and so forth.

Judge Meaney: Well, have you those, Mr. Finerty?

Mr. Finerty: We intend to supply them, your Honor.

Judge Meaney: All right; fine.

Mr. Hershenstein: May I also, if your Honors please, direct your Honors' attention to the testimony of Judge Frank Eggers on page 1437 of the record marked P-1, and his cross examination, which is part of the record. That testimony, if your Honors please, deals with the situation of Jersey City and its citizens, and the effect of any increased fare upon the industries and the general welfare of the people of Jersey City.

May I also direct your Honors' attention to the colloquy of court and counsel annexed to the intervening petition of the Director of Economic Stabilization and the Office of Price Administrator, which I take it counsel admits is a true copy taken from the proceedings marked P-1, which colloquy, if your Honors please, indicates first that Jersey City and the intervenors offered in evidence before the Interstate Commerce Commission at its reopened hearings, proof and exhibits, the purpose of which, as stated by coun-

[fol. 291] sel and as indicated by the colloquy, was to demonstrate to the Commission that the Hudson & Manhattan Railroad Company has increased its traffic by at least 30 per cent over its traffic in the year 1941, and that that proof is proof which the Interstate Commerce Commission had in its prior order directed and indicated that it would be unnecessary, should such a percentage of increase result, for the Hudson & Manhattan Railroad Company to receive any increase in fare over the present 8-cent fare.

Secondly——

Mr. Finerty: Mr. Hershenstein, I don't want to interrupt your argument but you seek unintentionally to commit me to certain statements that you say I will admit. Now, I——

Mr. Hershenstein: All we want you to admit is that that colloquy is a true copy——

Mr. Finerty: I prefer you to make your own statements.

Mr. Hershenstein: It is, if your Honors please.

Mr. Finerty: I am willing to admit part of what you say without following you through to the conclusion.

Mr. Hershenstein: All right.

Secondly, the colloquy indicates, if your Honors please, [fol. 292] that the City of Jersey City and the intervenors insisted upon their right to cross examine the witnesses produced by the Railroad Company at the hearings before the Interstate Commerce Commission for the purpose of proving that their revenue requirements are not those which they have insisted were necessary for the proper operation of the road.

Thirdly, that the breakdown of what they maintained was necessary expenditures upon their part and which they took into consideration in determining their revenues—they were in fact not proper items deductible from their reports.

And further, that in view of the fact that this is in fact a revenue case, we had the right to cross examine the witnesses of the Railroad in that respect and offer our own proof, but that the Examiner refused to permit us to cross examine the witnesses or introduce any such evidence; and that upon the ground, if your Honors please, that he was circumscribed by the order of the Commission directing the reopening of the proceedings, which order, he contended, limited the proceedings merely to a determination as to whether or not the Interstate Commerce Commission should revise its earlier report and permit the Railroad Company to introduce a token system, and refused to enter- [fol. 293] tain any other testimony than testimony upon that score.

Judge McLaughlin: You say that that is all set out in the transcript?

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: And apparently that that particular part of the transcript is attached to the Stabilization Director's intervening petition; is that right?

Mr. Hershenstein: Correct, sir.

Judge McLaughlin: All right. Go ahead.

Mr. Hershenstein: I am stating these facts, may it please the Court, without necessitating going through the entire record, and which I think are the pertinent parts of our case.

Judge McLaughlin: All right.

Mr. Hershenstein: Finally, if your Honors please, may I direct your Honors' attention to the order and conclusion——

Judge McLaughlin: Before you get to that, I am not quite clear on what you are marking and what you are not marking. Are the pleadings here? Is it your idea to offer some of the pleadings in evidence?

Mr. Hershenstein: If your Honor please, the PA is offered in evidence; what I have said to you——

Judge McLaughlin: That's the transcript—wait a min-
[fol. 294] ute—that's the transcript and some of the pleadings?

Mr. Hershenstein: That is the entire transcript.

Judge McLaughlin: All right.

Mr. Hershenstein: Before the Interstate Commerce Commission.

Judge McLaughlin: All right.

Mr. Hershenstein: Containing everything——

Judge McLaughlin: Now, in addition to that, you wanted to offer the two orders of the Commission.

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: I don't think you have put those in evidence yet.

Mr. Hershenstein: Yes, they are offered. That's all in here.

Judge McLaughlin: Are they in evidence?

Mr. Hershenstein: Yes, sir. P-1 now is in evidence.

Judge McLaughlin: Two orders of the Commission from which you are appealing, you apparently intended to put them in evidence.

Mr. Hershenstein: Oh.

Judge McLaughlin: Are they in evidence?

Mr. Hershenstein: I have said, if your Honor please, in my opening, that Mr. Finerty and the Interstate Commerce
[fol. 295] Commission——

Judge McLaughlin: You said that they admit the copies are the same. Well, have you offered the copies in evidence?

Mr. Hershenstein: No. I understand, if your Honor please, the pleadings are always in evidence, but I will offer them.

Judge McLaughlin: That's what I am trying to get clear.

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: Are you making some specific offer of those two orders?

Mr. Hershenstein: I will now offer them, if your Honor please, specifically, to be marked——

Judge McLaughlin: Because, after all, you are appealing from them. You put in your own proof, of course. We just want to get clear on what you are doing.

Mr. Hershenstein: All right, sir.

Judge McLaughlin: All right. Go ahead.

Mr. Hershenstein: I will do that in just one moment. Well, perhaps I had better do it now.

I therefore formally offer in evidence, if your Honors please, the orders, all of the orders, marked as Exhibits 1, 2, 3, 4, 5, 6, and 7, which orders are annexed to my amended bill of complaint, and ask that they be marked [fol. 296] as an exhibit.

Judge McLaughlin: Now, so we get clear as to the offer, which of those orders are the two that we are directly concerned with?

Mr. Hershenstein: Exhibit No. 2, sir, is the order of June 8, 19——

Judge Meaney: What page is that in the complaint, the amended complaint?

Mr. Hershenstein: The amended complaint——

Judge Meaney: What page?

Mr. Hershenstein: It begins, sir, Exhibit No. 2 is——

Mr. Eisen: Page 30.

Judge Meaney: Page 30?

Mr. Hershenstein: I am just coming to it. Correct, sir; page 30. And Exhibit 7, on page——

Mr. Eisen: 71.

Mr. Hershenstein: —71, is the order of November 2, 1943.

Judge McLaughlin: What's the next one?

Mr. Eisen: Page 71.

Mr. Hershenstein: Exhibit No. 7, sir, begins with page 71.

Now, supposing we have these formally marked and I will supply extra copies.

[fol. 297] I suppose this will be P-2.

The Clerk: Marked as Exhibit P-2 in evidence.

Mr. Hershenstein: Page 71.

The Clerk: Marked as P-3 in evidence.

Mr. Hershenstein: I now offer, if your Honors please, the report of the Interstate Commerce Commission dated July 11, 1938, which is Exhibit 1, beginning on page 13, of the amended complaint.

The Clerk: Marked as Exhibit P-4 in evidence.

Mr. Hershenstein: I offer, if your Honors please, the report of the Interstate Commerce Commission dated August 3, 1943, which begins on page 45, referred to as Exhibit 3 in the amended complaint.

The Clerk: Marked as Exhibit P-5 in evidence.

Mr. Hershenstein: I offer, if your Honors please, in evidence the petition of the Hudson & Manhattan Railroad Company dated July 8, 1943, for reconsideration and modification of the findings made by the Commission in its report on further hearing, which is Exhibit 4 of the amended complaint, beginning on page 53.

The Clerk: Marked as Exhibit P-6 in evidence.

Mr. Hershenstein: I offer in evidence the reply of the protestants, dated July 14, 1943, to the said petition of the Hudson & Manhattan Railroad Company which I have just [fol. 298] offered in evidence, and which bears date July 8, 1943, which is Exhibit 5 of the amended complaint, beginning on page 66.

The Clerk: Marked as Exhibit P-7 in evidence.

Mr. Hershenstein: I offer in evidence the order of the Interstate Commerce Commission dated September 18th reopening the proceedings for further hearing, and circumscribing the plaintiff's right to produce evidence, referred to as Exhibit 6 in the amended complaint on page 7.

The Clerk: Marked as Exhibit P-8 in evidence.

Mr. Hershenstein: May I now, if your Honors please, direct you Honors' attention to the statement by the Interstate Commerce Commission bearing directly upon the offer of proof which we have proffered to the Commission, which proof the Commission refused to entertain and admit. That statement, if your Honors please, is found on page 73 of the amended complaint and is part of exhibit marked P-3, which is the order of the Interstate Commerce

Commission of November 2, 1943. That's the last of the two orders. That statement in the paragraph just ahead of the subdivision "Findings of fact," about the middle of the paragraph, reads:

> "Considering the contents of the motion now before us and the offers of additional evidence made at the [fol. 299] recent further hearing, we have no reason to believe that if the additional hearings sought were held, we would feel warranted in modifying our findings as made in the second report."

I direct your Honors' attention to that fact, indicating clearly that the Commission not only refused to entertain our evidence, but pre-judged what the evidence would show, and said that even if it was introduced, they probably wouldn't change their views.

With that, if your Honors please, we rest.

One thing more—just pardon me.

May I also direct your Honors' attention to Exhibit No. F-93, which is part of P-1 introduced in this cause, which exhibit indicates the number of passengers originating in the Jersey City stations for the year 1941, and discloses that at Journal Square there originated in 1941, 9,466,276 passengers; at Grove and Henderson Streets, 4,547,542 passengers; at Exchange Place, 3,748,728 passengers.

Judge McLaughlin: Mr. Hershenstein, is that set-up somewhere attached to any of the pleadings?

Mr. Hershenstein: No.

Judge McLaughlin: It isn't? All right.

Mr. Hershenstein: It merely is part of the record——

[fol. 300] Judge McLaughlin: All right; I understand.

Mr. Hershenstein: I am sorry; there is no way of identifying it other than that.

Judge McLaughlin: All right.

Mr. Hershenstein: I might conclude my presentation of our case by saying that with your Honors' permission, I should like to include the argument which I made; you will probably hear some argument on this in this case after the case is in, but as part of our case I should like to include the argument which we made in our opening and closing statements to your Honors upon the preliminary injunction.

Mr. Booth: If the Court please, while I believe the record will include the entire transcript of the testimony taken before the Commission, I think nevertheless we would like to have admitted in evidence as Exhibit No. 1 what is exhibit attached to our complaint—to our intervening petition—Exhibit A, beginning at page 10, which are certain extracts from the transcript at the reopened hearings on September 28th, beginning with page 10 and to the middle of page 25, inclusive; and as Intervenors' Exhibit No. 2——

Mr. Finerty: Mr. Booth, if you will pardon me.

Mr. Booth: Yes.

Mr. Finerty: I want to object to the offer of the Exhibit A [fol. 301] attached to your petition of intervention, on the ground that it is a duplicate or a duplication of part of Exhibit P-1, and unnecessary.

Judge McLaughlin: Have you finished your offer, Mr. Booth?

Mr. Booth: Not of all the exhibits, but I have finished——

Judge McLaughlin: Have you finished the offer on this particular exhibit?

Mr. Booth: Yes; that's right.

Judge McLaughlin: Well, why isn't that the fact? What you are doing, I suppose, is merely calling special attention to part of the transcript; isn't that it?

Mr. Booth: That's correct. I will agree that——

Judge McLaughlin: With the record in evidence, I would be inclined to agree with Mr. Finerty.

Mr. Booth: Then I will withdraw my offer.

Judge McLaughlin: All right.

Mr. Booth: Then there will be marked as Intervenors' Exhibit No. 1, the petition—the motion of the Economic Stabilization Director dated October 14th, which is attached to our intervening petition as Exhibit C, pages 26-29, inclusive.

I ask that that be marked as Intervenors' Exhibit No. 1. [fol. 302] The Clerk: Marked as Intervenors' Exhibit No. 1 in evidence.

Mr. Booth: I would also like to have marked as Intervenors' Exhibit No. 2, the reply of the Director and the Administrator to your petition for reconsideration and modification.

This is the copy, which I will be glad to hand you——

Mr. Finerty: All right.

Mr. Booth: That is to be marked Intervenors' Exhibit No. 2.

The Clerk: Yes.

Mr. Finerty: That reply of July 19th——

Mr. Booth: July 19, 1943.

Mr. Finerty: Yes.

The Clerk: Marked as Intervenors' Exhibit No. 2 in evidence.

Mr. Booth: I would like also to mark as Intervenors' Exhibit No. 3, exceptions filed on behalf of the Price Administrator to the report of the Examiner, Trezise, which was filed in this case. That's dated March 8, 1943.

Mr. Finerty: Yes.

The Clerk: Marked as Intervenors' Exhibit No. 3 in evidence.

Mr. Booth: And as Intervenors' Exhibit No. 4, the brief [fol. 303] of Economic Stabilization Director upon the reopened hearing, and that's dated October 14, 1943. That was filed with the Commission.

The Clerk: Marked as Intervenors' Exhibit No. 4 in evidence.

Mr. Booth: I understand that Mr. Reidy will submit to the Court as an exhibit the order of the Interstate Commerce Commission allowing the Director and Price Administrator to intervene before the Commission.

Mr. Mulcahy: Yes. Yes, your Honors, that is the order of November 13, 1942.

Mr. Booth: I don't know just how much time the Court has in mind for the argument on the question of the final, permanent injunction. We have prepared a brief, which we planned to submit to the Court. I don't know how much time counsel for the Railroad plans to take.

Judge McLaughlin: Are you finished now?

Mr. Booth: I have finished with the offer of exhibits, yes.

Judge McLaughlin: Well, we will see. You rest then, do you?

Mr. Booth: Yes. I adopt the exhibits offered by counsel [fol. 304] for the City of Jersey City as our exhibits, also.

Judge McLaughlin: All right. What's your idea, Mr. Finerty, on your side here, now, as to time?

Mr. Finerty: Well, of course, what argument we make will be——

Judge McLaughlin: I am not talking so much about argument. I suppose you have some offers there?

Mr. Finerty: Yes, we have.

Judge McLaughlin: Which won't take very long.

Mr. Finerty: I can make them now, if it is agreeable to the Court.

Judge McLaughlin: Exactly. Well, I think Mr. Booth, we will let Mr. Finerty go ahead and make his offers, and then we will see about the time for argument a little later; and that, of course, includes any offers on behalf of the Commission also.

Mr. Mulcahy, you are here for Mr. Reidy today, are you?

Mr. Mulcahy: Yes, sir.

Mr. Finerty: If you will indulge me a moment, your Honor.

Judge McLaughlin: Certainly.

Mr. Finerty: So much of what we were going to offer has been offered, I don't want to duplicate it.

Judge McLaughlin: All right.

[fol. 305] Mr. Finerty: I desire to offer in evidence, your Honors as—how shall I mark it?

Judge McLaughlin: I suppose as Hudson & Manhattan 1.

The Clerk: We have Exhibits 1 and 2 here. They were offered previously, at the last hearing. The next number would be 3.

Mr. Finerty: Now, on the interlocutory injunction, your Honor, there were two exhibits filed as 1 and 2.

Judge Meaney: Suppose you adopt those now and then mark this one 3.

Mr. Finerty: 3; very well. I ask that there be considered in evidence Exhibits 1 and 2 marked on the hearing on the interlocutory injunction.

Judge McLaughlin: And what are they, Mr. Finerty?

Mr. Finerty: Exhibit D-1 is reply of Hudson & Manhattan Railroad Company to motion of Fred M. Vinson, Economic Stabilization Director, by Prentiss Brown, Price Administrator, for modification and amendment of the Commission's order of September 18, 1943, and for reopening.

Exhibit D-2 is a letter addressed by Mr. Hershenstein and Mr. Eisen to Mr. Bartel, secretary of the Interstate

Commerce Commission, dated October 26, 1943, purporting to adopt the petition of the Director of Price Administra-
[fol. 306] tion, for modification of the order of September 18, 1943.

I offer as Exhibit D-3, petition of June 27, 1942, for the reopening of the proceedings herein, for further hearing, et cetera.

The Clerk: Marked as Exhibit D-3 in evidence.

Mr. Finerty: I offer in evidence as Exhibit D-4, the reply of the City of Jersey City to the petition of the Hudson & Manhattan Railroad Company for such reopening, such reply being dated July 6, 1942.

The Clerk: Marked as Exhibit D-4 in evidence.

Mr. Finerty: I offer in evidence as Exhibit D-5 the reply of the Hudson Bus Transportation Company, et al., Protestants, dated——

Judge Meaney: D-5, what's that?

Mr. Finerty: The Hudson Bus Transportation, et al., Protestants, reply of July 10, 1942 to the petition of the Hudson & Manhattan Railroad Company for reopening. That is the answer filed by Mr. Behr.

The Clerk: Marked as Exhibit D-5 in evidence.

Mr. Finerty: I offer in evidence as Exhibit D-6, copy of a letter of October 17, 1942 from Harry R. Booth, Utilities Counsel, legal division, Office of Price Administration, to W. P. Bartel, secretary of the Interstate Commerce Commission, asking leave to file a brief as intervenor in the
[fol. 307] proceedings before the Commission, under the provisions of the Act of October 2, 1942.

The Clerk: Marked as Exhibit D-6 in evidence.

Mr. Finerty: I offer in evidence as Exhibit D-7, the notice and consent to intervention directed to the Price Administrator as representative of the Director of Economic Stabilization by the Hudson & Manhattan Railroad Company, dated November 9, 1942.

The Clerk: Marked as Exhibit D-7 in evidence.

Mr. Finerty: I offer as Exhibit D-8, the report proposed on further hearing by the Examiner, R. N. Trezise, of the Interstate Commerce Commission.

Judge Meaney: What is that dated, Mr. Finerty?

Mr. Finerty: Do you know the date of this report?

Mr. Booth: Is that properly in evidence in this case?

Judge Meaney: Well, it is offered.

Mr. Booth: Isn't it dated?

Mr. Finerty: No, the copy is not dated.

I may say, your Honors, it is the proposed report of the Examiner, preceding the order of June 8th——

Judge Meaney: How do you spell his name?

Mr. Finerty: T-r-e-z-i-s-e, Trezise.

Mr. Hershenstein: As I understand it, if your Honor please, this report of Trezise was overruled by the Com-
[fol. 308] missioners and an order made by the Commission upon due determination of the Interstate Commerce Commission.

Judge McLaughlin: Well, it is not offered as a report; it is offered as a proposed report. Do you object to it?

Mr. Hershenstein: Yes. No, I have no objection to it.

Judge McLaughlin: Do you object to it, Mr. Booth?

Mr. Booth: No, no objection.

Judge McLaughlin: All right. That's No. 8.

Judge Meaney: Well, approximately when, Mr. Finerty? Just an approximation of the date.

Mr. Finerty: Approximately January 25, 1943.

Judge Meaney: Around January.

Mr. Finerty: Yes.

The Clerk: Marked as Exhibit D-8 in evidence.

Mr. Finerty: We will advise the Court later as to that date.

Judge Meaney: No, it is just an approximation that I want, that's all.

Mr. Finerty: It was some time in the latter part of January or the early part of February, 1943.

Judge Meaney: All right.

Mr. Finerty: I offer in evidence as Exhibit D-9, excep-
[fol. 309] tions of the New Jersey protestants to the report proposed by Examiner Trezise.

The Clerk: Marked as Exhibit D-9 in evidence.

Mr. Finerty: I offer in evidence as Exhibit D-10, the reply of the Hudson & Manhattan Railroad Company to the exceptions to the report of Examiner Trezise, the reply going both to the exceptions of the City of Jersey City and of the Office of Price Administrator, and the reply being dated March 18, 1943.

The Clerk: Marked as Exhibit D-10 in evidence.

Mr. Finerty: Now, your Honor, Mr. Reidy advised me over the telephone yesterday that he expected to file here a copy of the oral argument before the Commission of April 20, 1943. Mr. Reidy, as the Court has been advised,

is ill, and that copy is not here but we can supply one. It would logically come at——

Judge McLaughlin: I think Mr. Mulcahy will probably know about that.

What is it, Mr. Mulcahy?

Mr. Mulcahy: That is true, your Honor. Mr. Reidy is ill, and he asks permission of the Court to forward that to the Court, the oral argument of April 20, 1943, before the Interstate Commerce Commission.

Judge Meaney: Well, have you it, Mr. Finerty?

Mr. Finerty: I haven't a copy here with me.

[fol. 310] Have you one?

I haven't a copy here, your Honor.

Judge McLaughlin: Well, let Mr. Reidy forward it. Is there any objection to that being done?

Mr. Hershenstein: No objection, if your Honor please.

Judge McLaughlin: All right.

Mr. Finerty: Can it be——

Judge McLaughlin: Are you finished with your exhibits, Mr. Finerty?

Mr. Finerty: Almost; not quite.

Judge McLaughlin: All right. We will hold that for a moment. You want that to go in as Mr. Reidy's?

Mr. Finerty: Could that be marked as Exhibit D-11?

Judge McLaughlin: Well, Mr. Mulcahy, is Mr. Reidy going to have other exhibits?

Mr. Mulcahy: Yes, your Honor.

Mr. Finerty: I will withdraw that offer, subject to Mr. Reidy's re-offering it.

I desire to offer as Exhibit D-11 a stipulation entered into between counsel for the various parties upon the oral argument, with reference to certain traffic statistics.

The Clerk: Marked as Exhibit D-11 in evidence.

Judge McLaughlin: What was the date of the oral argu-

[fol. 311] ment, Mr. Finerty, please?

Mr. Finerty: April 20, 1943.

I might substitute this copy, if you don't mind; that's all marked up.

(Substituted copy marked Exhibit D-11 in evidence.)

Mr. Finerty: That completes our offers, may it please the Court.

Judge McLaughlin: All right. Then you rest, do you?

Mr. Buck: That's subject to Mr. Reidy's producing certain——

Mr. Finerty: Well, I understand Mr. Mulcahy is going to make certain offers now.

Mr. Mulcahy: On behalf of Mr. Reidy, of the Interstate Commerce Commission, your Honors, we desire——

Judge McLaughlin: Is Mr. Reidy better, Mr. Mulcahy? Is he better? Does he feel better?

Mr. Mulcahy: He is better, your Honor.

Judge McLaughlin: All right. Go ahead.

Mr. Mulcahy: He desires to have made part of the record the order of July 13, 1942, reopening the case of the petition of Hudson & Manhattan Railroad Company——

Judge Meaney: Isn't that in?

Mr. Mulcahy: It may be in; I am not certain.

Judge McLaughlin: I think whatever exhibits you offer [fol. 312] should be marked as exhibits consecutively, starting with 1, if you haven't any others in.

(Colloquy between Court and the clerk as to physical marking of exhibits.)

Mr. Mulcahy: The second one——

Judge Meaney: The first is what?

Mr. Mulcahy: The first is the order of July 13, 1942, reopening the petition of the Hudson & Manhattan Railroad Company.

Judge Meaney: Isn't that already in?

Mr. Mulcahy: I haven't heard it called, your Honor.

Mr. Finerty: No, it is not.

Judge Meaney: All right.

Mr. Mulcahy: The second one was referred to by Mr. Booth as the order of November 13, 1942, granting the OPA the right to intervene.

Judge Meaney: Wait a minute. The second was what?

Mr. Mulcahy: The order of November 13, 1942, granting the OPA the right to intervene.

The third, your Honors, is the oral argument before the Interstate Commerce Commission by the various litigants on April 20, 1943.

These documents will be forwarded shortly.

Judge McLaughlin: All right.

[fol. 313] (Documents above referred to to be received in evidence and marked as Exhibits D-1, D-2, and D-3, for the Interstate Commerce Commission.)

Judge Meaney: Does that complete all of the offers, gentlemen?

Mr. Finerty: So far as we are concerned, yes.

Judge Meaney: Mr. Finerty, so far as the Hudson & Manhattan and the I. C. C. are concerned, how many arguments will there be? There will be yourself,——

Mr. Mulcahy: Mr. Reidy, your Honor, is willing to submit his case on his brief, plus any arguments that might be advanced by Mr. Finerty.

Judge Meaney: All right. Then there will be just one for the defendant.

Mr. Mulcahy: I understand so.

Judge Meaney: And for the City of Jersey City and the intervenors just two.

Mr. Hershenstein: Just two.

Mr. Booth: I assume we might have a half hour on opening and then also some little time for reply.

Judge McLaughlin: A half hour between you?

Mr. Booth: Well, I don't know; I thought for myself I might need about half an hour, considering the arguments that were made before; but whatever the Court determines——

[fol. 314] Judge McLaughlin: Well, we will see. How much do you want in reply, do you suppose?

Mr. Booth: Well, I don't know how much time Mr. Finerty plans to take.

Judge McLaughlin: Well, we will see about that.

Mr. Finerty, how much time do you think you can cover the thing in?

Mr. Finerty: Well, it is a little difficult to hazard a guess.

Judge McLaughlin: I think it is, too.

Mr. Finerty: I don't know how much my opponents will say, but I should say an hour.

Judge McLaughlin: Well, suppose we allow Mr. Finerty up to an hour and we allow you, Mr. Hershenstein and Mr. Booth,—apparently you can complete your opening in a half hour apiece; is that right?

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: And then we will give you a little time to reply. Is that satisfactory?

Mr. Hershenstein: That is satisfactory, sir.

Judge McLaughlin: Suppose we take a recess for two or three minutes.

Mr. Hershenstein: If your Honors please, just before the recess, just to complete our offers, there is one brief I would [fol. 315] like to offer in evidence; it is a brief of the protestants on further hearing, commencing September 28, 1943. That will be Exhibit P-9.

The Clerk: Marked as Exhibit P-9 in evidence.

Mr. Hershenstein: Mr. Finerty offered his brief, so I think, to complete the record, it will be necessary to offer our brief.

Judge McLaughlin: We will take a recess for two or three minutes.

(Following a short recess at this point the hearing was resumed as follows:)

Judge McLaughlin: Go ahead.

Mr. Hershenstein: If your Honors please, the report and order dated August 3, 1943, in effect proceeded from the ex parte affidavit of the Railroad, which requested a modification of its former order.

In the complaint which Jersey City filed on September 13, 1943, we alleged and charged that we were deprived of our full day in court by not having been given the opportunity of cross examining witnesses, refuting testimony which had been offered by the Railroad Company, and also we were prevented from offering testimony in counter evidence to the testimony which was produced.

The Interstate Commerce Commission then on September [fol. 316] 18, 1943, and prior to the argument upon our first bill for an interlocutory injunction, opened the proceedings, and they did so, to use their own expression, out of an abundance of caution, to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report on August 3, 1943, and to afford any party hereto the right to cross examine adverse witnesses.

Further hearings were then had before the Interstate Commerce Commission and they began, as I recall, on September 28, 1943. They were held pursuant to this order of September 18, 1943, and that order, however, circumscribed the proceedings before the Interstate Commerce Commission in the following language: "for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report on August 3, 1943, on further

consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted nor shall a proposed report be issued, nor shall there be further argu-- [fol. 317] ment before the Commission."

When the proceedings opened, if your Honors please, the examiner interpreted this order of the Interstate Commerce Commission and said that the exact nature of this order is as follows, and I am now reading from the colloquy of the Commissioner in the record.

"Examiner Koch."

It is on pages 2034-2036 of the transcript.

"Examiner Koch. So that there may be no misunderstanding as to the scope of this further hearing, I wish to make the following statement:

"The order of the Commission of September 18, 1943, which reopened this proceeding provides, and I am now quoting: 'That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943.' "

He further stated:

"Those modifications were from a finding that a nine cent downtown fare had been justified, as made in the report of June 8th, to a finding as made on August 3, that an alter- [fol. 318] native downtown fare of eleven tokens for $1 or a cash fare of a dime had been justified with the proviso that contemporaneously the same alternative basis shall be maintained on the uptown line.

"In every other respect the prior findings of June 8th were affirmed."

"Therefore," said Examiner Koch, "this further hearing under the Commission's order is restricted to evidence bearing upon the issue of whether or not these modifications in the prior finding, which had approved the downtown fare of 9 cents, shall stand.

"We are not here retrying the lawfulness of the present 9 cent fare."

Now, during the course of the hearings, if your Honors please, all of those who were opposed to the orders of the Interstate Commerce Commission sought repeatedly to establish that the present revenues of the Railroad were sufficient in and of themselves to care for all of the current monetary requirements of the railroad, including the full interest on their bonded indebtedness. The sum total effect thereof was to establish by evidence that from a revenue standpoint, and I shall speak of that in a few minutes, the present local downtown fare of 8 cents was sufficient per se.

We sought in addition to establish that the operating statements which the Railroad Company submitted were [fol. 319] inflated in many substantial respects, particularly so far as they related to a reserve they set up for war contingency. For example, they set up $240,000 a year for a war contingency. We were prepared to show, if your Honors please, that after they set up that reserve, the Government issued its war insurance, which would be a trifling sum per year—several thousand dollars as I recall. We were prepared to show that that $240,000 reserve was entirely exorbitant and to deduct that sum from their annual income manifestly would be an improper result, and the result would therefore be the sum which they would be required to earn by income and by revenue. But the examiner refused to entertain any such evidence.

We further endeavored to establish that the 9-cent fare authorized by the Commission's order of June 8, 1943, was productive of revenues over and above those to which the carrier was legally entitled or actually required, and that therefore ipso facto the proposed alternative plan which the Railroad Company sought to establish and which the Interstate Commerce Commission approved in its report on November 2nd, would have produced and would produce excessive revenues substantially over and above those which are required by the Railroad Company.

[fol. 320] We further sought to establish in the proceedings before the Commission on the reopening of the proceedings, that the Railroad Company was derelict in its obligations to conserve its sources of revenue by failing to carry out what is in fact, if your Honors, please, a man-

date, considered a mandate by the Commission because it refers to it in its prior orders, and considered a mandate by the Supreme Court, because the Railroad Company before the Supreme Court and before this Court argued that the directive order or the directive statement of the Commission that if they need more revenue they should procure it from a more favorable division of their joint fare arrangement with the Pennsylvania Railroad Company, was never even attempted to be lived up to by the Railroad Company, up to the very moment we are now arguing this case; and I say the Railroad Company before the United States Supreme Court said that the Interstate Commerce Commission had no right to make such an order or such a finding or such a conclusion, and the Supreme Court in their opinion justified all of the findings of the Interstate Commerce Commission, including that particular finding.

So that we said to the examiner, "We have a right to show, if your Honor please, that the Railroad Company did not seek any further revenues under the direction of [fol. 321] the Interstate Commerce Commission."

The examiner refused to entertain any such testimony.

We sought to show further in that connection, with the joint traffic, the increased fares effective February 10, 1942, resulting from the Interstate Commerce Commission authorization to increase fares, which I have referred to in my argument on the interlocutory injunction as ex parte 148—that it produced additional joint line revenue, that increase did, of not less than $400,000 a year annually, from which the Hudson & Manhattan Railroad, through its negligence, we charge, and dereliction, failed to obtain one penny from the Pennsylvania Railroad Company.

Now, the position of the Railroad Company in this proceeding, is that the current downtown local fare of 8 cents would produce sufficient revenue to meet obligations only if the 1943 patronage reflected an increase over and above the 1941 patronage to the extent of 30 per cent. With respect to that, the report of June 8, 1943, of the Interstate Commerce Commission, made this finding:

"Under present fares (referring to the current 8-cent downtown fare and the present 10-cent uptown fare)," the Interstate Commerce Commission held that "it would be [fol. 322] necessary for its annual traffic to increase by about 30 per cent over that of 1941 in order to meet the current interest requirements of its bonded indebtedness."

We, therefore, in the reopened proceedings before the Interstate Commerce Commission, sought to establish, if your Honors please, that very fact. We sought to establish that the patronage of the Hudson & Manhattan for the first six months of 1943 reflects an increase of 30 per cent over 1941, in their traffic; and that, accordingly, there was no revenue need for the prescription of any fare over and above the current local fare of 8 cents.

We sought to have the record brought down to date relative to the current income and the expenses of the Railroad Company, both as to its railroad operations and as to its overall operations, for the period ending August 31, 1943, or the latest available data, but the examiner refused, and the Interstate Commerce Commission, by affirming his order, refused to entertain that evidence.

We made an attempt to adduce facts in support of all of these matters which have been mentioned to your Honors, a statement of which would be repetitious. On each occasion, when we endeavored to introduce that evi- [fol. 323] dence, or cross examine the witnesses in order to produce the testimony we had referred to, the examiner justified his exclusion wholly and solely upon the limitations prescribed in the order, the excerpt of which I have read to your Honors a few minutes ago.

Now, the issues in this case, if your Honors please, to our mind appear to be two-fold. As I have indicated, the proceedings before the Interstate Commerce Commission were in fact a revenue proceeding; and so the first question which logically can be propounded is, does the Railroad need more revenue? That, to my mind, was the first and fundamental issue in the reopened proceeding.

Secondly, if they need more revenue, the Act itself, Section 15a of the Interstate Commerce Act, provides that the Interstate Commerce Commission may afford that relief only upon a prior finding that the Railroad was honestly, economically, and efficiently managed to provide railroad transportation; and so that became the second question which these proceedings involve.

Now, these being the issues,—I didn't take notice of the time, if your Honor please.

Judge McLaughlin: You have about fifteen minutes more.

Mr. Hershenstein: I think I shall finish.

[fol. 324] These being the issues involved, we say to your Honors, that the Commission was obligated under the law, as a matter of law, to receive any and all evidence relating to those issues. Their failure to do so is the foundation of our present bill of complaint.

Now, let me, if your Honors please, indicate to you what we conceive to be clearly the established law governing the facts in this case.

In authorizing increased rates the Commission was required to observe the statutory requirements. I have already adverted to the fact that there are three provisions under which the Railroad Company could have sought increased fares. Under Section 1 they can seek to establish an increased fare, but that fare must be reasonable. If it is unreasonable, it is illegal. This Court, the Supreme Court of the United States, and the Interstate Commerce Commission have already held that a 10-cent fare on the downtown line is unreasonable, and therefore it is illegal. It has been held over and over again that every passenger is entitled to a reasonable fare, and it is the Commission's duty to fix fares which are reasonable, whether or not the resulting revenue in the aggregate is higher or lower than that they previously derived therefrom. And those cases lead me to say to your Honors that if it be a fact that they [fol. 325] are reducing the uptown fare from 10 cents to 11 tokens for a dollar, it does not cure the unreasonableness of the downtown fare, and therefore it is illegal, because every passenger is entitled to a reasonable fare, and that passengers who use the downtown line cannot be charged an illegal fare simply because they reduce the uptown fare by a small percentage.

Now, Section 3 of the Act, which is another provision under which carriers may proceed to increase their tariffs, provides for the establishment of a tariff which, however, the Act says, under Section 3, cannot be discriminatory or prejudicial, or create any undue preference.

We say, if your Honors please, that they can't establish a 10-cent fare on their downtown line because the Interstate Commerce Commission has already held that if the uptown line charges 10 cents per passenger, the downtown line fare must be less than ten cents, and hence the establishment of a 10-cent fare is discriminatory as to those passengers who would be compelled to pay a 10-cent fare.

And so they are relegated, if your Honors please, to the revenue provision which I indicated. Under that provision, even though a fare may be unreasonable, or discriminatory, the Commission is vested with the power to in-
[fol. 326] crease the fares provided those two elements are present, namely: Do they require increased revenue? Secondly, are they efficiently and honestly and economically regulated, controlled, and operated?

And where we attempt to show that they were not and they need no revenue, the Commission necessarily must accept that evidence and proof and not pre-judge our case by saying, as they did, in the order, which is clear proof they denied us that right, that "Even if you had put it in, we would probably have not changed our minds."

I think the Commission has no right to pre-judge what they think they would say, without having the evidence before they say it.

Now, in the order of August 3, 1943, which has its counterpart in this later order of November 2, 1943, this order, that last order, was based entirely, if your Honors please, upon a disability of the carrier. All the Railroad did was to say, "Well, you permitted us to increase our fares to 9 cents, but we are physically unable to do it because of our coin collection boxes and the mechanism which operates them."

If your Honors please, the courts have held that the physical disability of a carrier is no excuse to establish a higher or illegal rate. Simply because they can't put into
[fol. 327] operation a 9-cent fare because of their coin collection system, that doesn't justify the Commission in permitting them to increase their fares to an illegal rate. The brief which we will submit to your Honors amply justifies that position by the citations which we have therein set out.

If it be a fact, as they have suggested, that "We will simultaneously reduce the uptown fare so that you can buy 11 tokens for a dollar," our answer is, unequivocally, that that doesn't cure the situation; first, because the uptown traffic is about 25 per cent or less of the downtown traffic, and certainly that doesn't balance or equalize hte fares; and secondly, merely to reduce the uptown traffic doesn't justify an exorbitant fare on the downtown line. But the Interstate Commerce Commission, in all of its findings, in all of the reports which we have offered in evidence, found

that a 10-cent fare is unreasonable. They have never said one word, nor has there been any evidence produced by the Railroad Company up to this very minute, which would justify a change in that ruling. As a matter of fact, even in its last report, of November 2, 1943, they again say that "Our former determination that 10 cents is an illegal fare is still our ruling and still our judgment." Yet, in spite of [fol. 328] that they made a modification which we have referred to.

Now, there is one matter which I desire to call to your Honors' attention for a moment, in these proceedings. The order of November 2nd was made as a result of this so-called disability. We are also asking an injunction against the order of June 8, 1943, which gave them the increase to 9 cents. We did not refer to that order in our original bill because when our original bill was filed here, the Commission hadn't reopened the proceedings. It wasn't until the reopened proceedings, when we attempted to show that under their June 8th order, 1943, which permitted them to increase their fares to 9 cents, when we endeavored to introduce testimony that they had met their requirements under the Commission's own ruling, that they for the first time refused to admit that evidence.

Therefore, if your Honors please, those things came in after we had filed the original bill; and when we filed our second bill, the Interstate Commerce Commission by that time had refused to hear any evidence which would tend to show that the 9-cent fare was unnecessary, because they had already received all the necessary revenue which the Railroad Company under its own order required for the pur- [fol. 329] pose of economically operating its railroad.

And so, if your Honors please, both orders of June 8, 1943 and November 2, 1943, now before your Honors, should be enjoined.

Now, we have been deprived, manifestly, of a full hearing before the Interstate Commerce Commission. It has been held by the United States Supreme Court that the Interstate Commerce Commission bing a quasi-judicial body, the Interstate Commerce Commission is required to accord all litigants before it a full and fair hearing. It has been so held in Interstate Commerce Commission vs. Louisville & Nashville Railroad Company. With that fundamental rule of law, if your Honors please, what the Commission in this case did to the protestants before them, to

Jersey City in particular, and to the Director of Economic Stabilization and the Office of Price Administration, to my mind, if your Honors please, is the clearest evidence of a denial of the right of a full, fair, and impartial hearing, which the United States Supreme Court often said was a prerequisite to a determination by the Interstate Commerce Commission of any matters before it.

There is one matter which Mr. Finerty has already adverted to in the proceedings and in his offer of proof, and that is that we haven't exhausted our administrative reme- [fol. 330] dies. The record before you now indicates that the Director of Economic Stabilization, through Mr. Booth, filed a petition to reopen the order of June 8, 1943, at the time when he made an application that all of the proof which we have offered should be admitted before the Commission, and manifestly, if your Honors please, it would be a duplication of work for Jersey City to print and file a similar motion. Instead of that we wrote a letter to the Commission, offered in evidence as an exhibit by Mr. Finerty, in which we said, "We have read the petition; we join in it; we affirm it; and consider it part of our application before the Commission."

The Commission didn't reject our communication and say, "That isn't the proper practice."

It has been held, if your Honors please, it is a familiar legal principle, that the necessity of a formal demand is often waived or obviated by the conduct of the other party, or where the state of the case is such as to show that the matter would have been entirely unavailing. Manifestly, this petition having gone in in which we have joined by letter and made a part of our request, a denial of the petition of the OPA is in fact a denial of an application by us to reopen the proceedings of June 8, 1943.

[fol. 331] We respectfully submit, if your Honors please, that we have established before your Honors all the facts entitling the plaintiff and the intervenor to a permanent injunction.

Judge McLaughlin: All right, Mr. Booth.

Mr. Booth: If the Court please, we have prepared a brief, which unfortunately, because of the limitations of time, we have not been able to have printed or mimeographed. I will hand it to the Court now, if that's agreeable. (Handing to the Court.)

Mr. Hershenstein: I will hand up, if your Honors please, my brief. (Handing to the Court.)

Mr. Booth: I have not yet seen the brief, if one is to be filed, by the Hudson & Manhattan Railroad. I did receive, a few minutes ago, a copy of a brief which I understand the Interstate Commerce Commission is planning to file with this Court. It may be that we may desire to reserve the right to file, within a very short time, a very short reply brief.

This case, as we see it, involves some very vital and important questions, involving primarily the question as to whether the Interstate Commerce Commission, in the determination of rates under its own Act, is free to establish and to increase the rates over and above the rates in effect on September 15, 1942, under substantially peacetime prin- [fol. 332] ciples, though I believe that counsel for Jersey City has shown that even under the provisions of the Commission's own act, the order is invalid. But if the Commission during the war is under an obligation to give any effect whatsoever to the wartime conditions and the stabilization legislation enacted by Congress to keep down the cost of living, particularly under the Act of October 2, 1942, then we say that this order is invalid and must be set aside by this Court because of the fact that the Commission has failed to apply legal standards, proper legal standards, governing the determination of rates under wartime conditions.

And, of course, it is a well-settled principle that this Court and the courts may properly set aside orders of the Interstate Commerce Commission, or of any administrative body, where they are called upon to review orders, if they fail to apply proper legal standards.

I am going to devote most of the time I have, I have asked only for what I consider to be a limited time for the presentation of the oral argument, partly because of the fact that some of this was gone over in connection with the request for the interlocutory injunction, partly also because counsel [fol. 333] for the Interstate Commerce Commission is not here today and will rest upon his brief—we contend, therefore, that this order, the orders of the Commission of June 8, 1943 and November 2, 1943, are invalid because they did not give effect to wartime conditions and the stabilization legislation, as the Commission was under a legal obligation to do; that the Commission also failed to give to the Director the fair hearing that he was entitled to under the Commis-

sion's own statute, as well as under the Act of October 2nd, and the Constitution, and that moreover there was no evidence to support the principal findings of fact to the extent they were made in this case.

Congress, to be true, did not, and we are not suggesting in this case, as is contended by the Commission, and apparently is also the position of the Railroad—we are not suggesting that Congress gave us by the stabilization legislation the power to regulate the rates of railroads or of public utilities. Obviously, we are not suggesting that position. Congress did, however, provide, in the Act of October 2nd, and this was a compromise provision, in substitute of an original provision approved by the Senate of the United States and proposed by Senator Norris, under which no increase could be made in utility or common carrier rates [fol. 334] without the approval of the President. That was the Act of October 2nd as passed by the Senate. Then it went before the House and the House refused to accept the Norris provision. It said, the Act went to conferees and they agreed upon this provision: "Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State or Municipal authority having jurisdiction to consider such increase."

We suggest to this Court that Congress, in leaving to the regulatory agencies, State and Federal, the authority that they already have, over the establishment of utility and common carrier rates, and by providing and prohibiting any utility from increasing its rates over and above the rates in effect on September 15, 1942, without notice and consenting by such utility to the President or his agent, did not intend thereby that the participation by the President or his agent in the hearings before the regulatory agencies should be of a nominal character, and that the rates should be increased over and above the rates in effect on September 15, [fol. 335] 1942, unless full and complete effect was given by the existing regulatory agencies to the wartime conditions, the stabilization legislation, and the great and vital need for preventing increases in the cost of living.

Now, the question as to the full meaning of the Act of October 2nd is in a sense a new one. It has come up into the courts, the higher courts, we will say, on two occasions. The question is now before the Supreme Court of the United States in connection with the granting of a petition to review a decision of the Court of Appeals of the District of Columbia, which sustained an order of the District of Columbia Commission authorizing an increase in gas rates in the amount of one and one-half per cent over and above—over the objections of the Director and the Price Administrator in that case. The case went to the District Court; the District Court set aside the Commission's order on our appeal; the Court of Appeals, by a two to one vote, sustained the Commission and reversed the District Court, and the Supreme Court of the United States has agreed to review that case. I have no doubt but that you will hear a great deal about that opinion from counsel for the Railroad. I want merely to suggest this to the Court, and I haven't mentioned it in the brief because the case is before the Supreme Court [fol. 336] of the United States——

Judge McLaughlin: Has it been argued, Mr. Booth?

Mr. Booth: No; it will be argued about the 1st of February, I believe. But the court there found that the determination of rates in the District of Columbia had been predicated upon a sliding scale arrangement, which apparently the court construed, we say, improperly, that we were trying to upset. But it did specifically find that the —well, I want to read this to the Court, because the court found it was not necessary, in authorizing an increase, to apply literally the standards of the Act of October 2nd, namely: to deny any increase unless necessary to aid in the prosecution of the war, or to correct gross inequities. But the court went on to say:

"The record in this case shows that the intervention of the Price Administrator was not without influence or effect. The Commission was not oblivious to the economic conditions consequent upon the war and did not disregard them in formulating its findings and opinion. It pointed out that its responsibilities were twofold, that is, to determine what increase, if any, the company was entitled to under the sliding scale for the ensuing year and also to give recognition to the existing economic situation and the ability of the com- [fol 337] pany to finance needed plant extension and render adequate service to consumers at the Nation's Capital. The

intervention and assistance of counsel for the Price Administrator were noted, and the findings, supported by substantial evidence, were made to the following purport and effect:"

Then it went on to say, in connection with the question as to whether a proper hearing had been granted the Price Administrator, that the Price Administrator made no definite offer of proof in connection with matters upon which he wanted the case reopened.

Of course, we think that the decision is not the law, but we say it doesn't apply to this case because, as the court found there, the Commission had given effect, it said, to the stabilization legislation, the court said the rates were being fixed under a sliding scale arrangement, which it said we were trying to upset, and the case is being reviewed by the Supreme Court of the United States, which indicates some considerable doubt, in my mind, as to whether the opinion will stand up before that court.

Now, there is another case, the Washington, Marlboro case, 132 Fed. (2d) 729, which I mentioned in our original brief, which involved the question as to whether or not a company that had filed a tariff for increased rates before [fol. 338] the Act of October 2nd went into effect, with the Interstate Commerce Commission, was under an obligation to give the Price Administrator, who has been acting for the Economic Stabilization Director, who was originally designated as the representative of the President in these cases, to give notice to the President and his agent under the Act of October 2nd, and the court found that it did. It said—I am reading from 132 Fed. (2d), Henderson v. Washington, Marlboro & Annapolis Motor Lines, 132 Fed. (2d) 729, at 732:

"But, apart from all statutes existing prior to October 2, 1942, and all orders, rules and regulations made pursuant to those statutes, the Act of October 2, 1942, is conclusive of the issue presented for our decision. As it was enacted subsequent to the Interstate Commerce Act it supersedes that Act, to whatever extent may be necessary to achieve its own purpose."

That was the unanimous opinion of the Court of Appeals. A petition was filed with the Supreme Court, asking that that decision be reviewed. That was denied by the Supreme Court of the United States during the last term. But we think that it is clear under the record here that no effect,

contrary to the clear intent of Congress, contrary to the obligation of the Commission in fixing just and reasonable [fol. 339] rates under its own statute, to give consideration to existing conditions, to deny any increases unless they are absolutely necessary, that the Commission gave no effect whatsoever to the stabilization legislation.

The Commission in its order, in its June 8th order, stated:

"It seems to us that an increase of one cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents per passenger, as to be negligible."

Now, that's when the Commission increased the cost of transportation only 13 per cent over and above the daily cost of transportation on September 15, 1942, notwithstanding the fact that the cost of transportation on the downtown lines had already gone up 33⅓ per cent over and above the rates in effect in 1938; and subsequently, as we have shown, they increased the cost of transportation 25 per cent, to a very, very substantial number of the users on the downtown line, and a total of 13 per cent to everybody.

Now, the true legal principle, the true principle of law, which the Commission, we suggest to this Court, was under [fol. 340] an obligation to apply, and which it failed completely to apply, was the principle applied by the Emergency Court of Appeals, when it was considering the effect of small increases. I have called those decisions to the Court's attention before. They are the Lincoln Savings Bank cases, 137 Fed. (2d) 228; they are referred to in my brief; and the Gypsum Company case at 137 Fed. (2d) 360.

In the latter case the Court said: "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral."

And I think that it is clear, when you read what the Commission said, in connection with the consideration that it must give to the Act of October 2nd, that apparently it was under the impression that small increases, and this is not a small increase, have no bearing at all upon the Government's effort to keep down the cost of living. Why, if the

principle that was applied by this Commission in this case were true, the New Jersey Board of Public Utility Commissioners could increase gas rates 10 to 25 per cent, saying, "Well, those individual increases are not going to have any [fol. 341] bearing upon the cost of living"; they could increase telephone rates, saying, "Each of these things individually hasn't any consequence upon the cost of living." The New York Commission could do likewise; and we would have a very, very serious situation.

Now, in addition to that, we say that it was illegal for this Commission to authorize an increase in rates over and above the rates in effect on September 15, 1942, without giving full and complete effect to the improvement in the company's business as a result of the war, and as a result of the restrictions imposed by the Government and the war agencies upon competitive forms of transportation—in connection with transportation companies, particularly transportation companies doing a local transportation, and we suggest to this Court that the Commission must make an affirmative showing; that if a carrier needs additional revenue through higher rates, the additional revenues will not be secured through the growth of the company's business as a result of the war, and the effect of the restrictions which the Office of Price Administration and other agencies, war agencies, have imposed upon competitive forms of transportation.

That was not considered in this case. As a matter of fact, a timely offer of the Director to present evidence upon [fol. 342] that vital issue, as we have shown to this Court, was denied. They would not even allow us to mark as an exhibit for identification—an effort on our part, a timely effort—evidence which would show that this Commission did not have to authorize an increase here, the company could obtain the additional revenues; that it was in fact making much more money prior to the war, and it was making more money under the 8-cent fare, in fact, than the Commission thought they would obtain under a 9-cent fare on the downtown line. And we were deprived of our fundamental rights. Why, it is the only thing—not the only thing, but it is the fundamental character of the showing which we, as presenting the effect of the war upon the right of utilities and carriers to increase rates, would be naturally concerned about.

Now, it has been suggested here that because we perhaps didn't offer that evidence before, we have been estopped, from bringing this suit. We made it clear to the Commission on every occasion that we appeared before the Commission, in connection with our exceptions to the examiner's report, the briefs that were filed—every time we appeared before the Commission we tried to get the Commission to consider that evidence, and the Commission in [fol. 343] its November 2nd order was itself under a very gross misapprehension as to what it had in the record. It thought it had in the record, and it stated so, we have pointed it out in our brief at pages 25 to 27—the Commission thought it had in the record the full evidence as to the year 1942. It did not have that evidence in the record. And the only thing that was brought in—it said that data was brought in at the time of the oral argument before the Commission—the only thing that was brought in at the time of the oral argument was a one page stipulation containing traffic figures for February and January, 1943.

Moreover, the Commission failed to apply proper standards of law governing the determination of utility rates under wartime, because where the utility rates were already at the highest level commensurate with the value of the service, and it now becomes possible to exact higher rates merely because of wartime scarcity, we say it is illegal and improper for a regulatory agency to authorize an increase in rates during wartime under those conditions; and this Commission had already found that the downtown fares were already at the highest level commensurate with the value of the service, that they couldn't get during [fol. 344] peacetime higher revenues with higher rates than 8 cents; and now, because of the wartime restrictions, they had reversed the process. And the railroad says that because of the peculiar wartime conditions, "We are going to take advantage of that, to obtain not only higher revenues than we were getting before the war, but far greater revenues because of the peculiar position that the riders find themselves in."

Where the utility's net income available to investors is now as great as it was in pre-war years, and where the utility's net income has actually been augmented by reason of wartime conditions—those, we say, as well as the principles that I have suggested to this Court for its consideration, are the type of principles which we suggest this

Court should lay down in considering this case, to be applied by a regulatory agency.

Moreover, in this case, there is another very fundamental fact. As this Court knows, the company had been directed back in 1938 to try to get additional revenues from the Pennsylvania Railroad. We tried on the September 28th hearing to develop evidence to contrast the efforts which the Railroad had gone — to get higher revenues from its riders and the efforts that the company had gone to to get higher revenues from the Pennsylvania Railroad, in ac- [fol. 345] cordance with the directions of the Commission; and we were prevented from developing that data. But in so far as the record before this Court shows, the only thing that was done by this Railroad was apparently in the five years the president paid a visit to the Pennsylvania Railroad. We tried to find out whether they had written any letters or any documents, whether they had filed any petitions, availed themselves in any way of their legal rights and their legal powers, and to aid the stabilization program by trying to get revenues from some other source, to cooperate with the stabilization program by trying to help us in the discharge of those very grave and serious duties, the most difficult duties that ever have been imposed upon any agency dealing with economic and financial problems, to see whether the Railroad had cooperated with us in any way. No, they spent and devoted their entire energy to try to increase their rates over and above the rates in effect on September 15, 1942, instead of attempting to eliminate the need for an increase by following the directions of the Commission itself, by trying to get, as it was legally and practically and economically entitled to, a better deal from the Pennsylvania Railroad on its divisions.

Now, we have outlined again in this brief that we are [fol. 346] entitled to a fair hearing, and that the Commission didn't give it to us; and we again call to this Court's attention the decision of the United States Supreme Court in the Indiana & Michigan Electrical Company case, which we have cited at pages 16 and 17, and that is, as the court said, in setting aside a decision of the War Labor Board, sustaining a decision of the Court of Appeals,—the court said that where a statute places a great degree of finality upon the findings of an administrative agency, the court has been insistent that where they make a limited review, the administrative agency do- not shut off a party's right

to produce evidence or conduct cross-examination material to the issue. And we think that decision applies to this case. We suggest that the Commission in its brief should have pointed out just how the Commission would have been injured if, when we assembled before the hearing, at the hearing,—how they would have been injured if we had been given the opportunity to present the evidence that we had ready, or to conduct the cross-examination of the company's witnesses that were there. We have again outlined the evidence that was improperly excluded, pointed out that the evidence that was excluded, both as to cross-examination and as to direct, was material evidence, bearing [fol. 347] upon the right of the Railroad to an increase; and we have suggested that we have exhausted our administrative remedy. We have repeatedly asked the Commission to reconsider its orders, and the Commission itself, in its June 8th order, stated, and we had the right to rely upon that, that if at any time prior to the expiration of the war, they said, by reason of changed conditions or otherwise, the revenue results to respondent should prove to have been materially different from those estimated, we could ask for further hearing. Well, we asked for it. And besides, the Supreme Court of the United States has held, in the case of Baltimore & Ohio, that Congress has not required that a petition for rehearing be filed before suits to enjoin orders of the Interstate Commerce Commission be instituted. But I wonder, in view of the reiteration, the constant reiteration, by the Commisison of the fact that it is insisting upon these increases, what additional purpose could have been served by going back to the Commission. For, moreover, as the Court well knows, the Commission in its final order allowed the company to file the new tariffs at once, and they were to go into effect in a period of fifteen days. Why, if we had gone again to the Commission, we would have lost our ability to prevent the increase, and lost our legal remedies.

[fol. 348] In the remainder of our brief we have outlined a great many errors, other errors, of law in the opinions of the Commission. We have suggested to the Court that we have not been estopped from bringing this action, and we suggest to the Court in our conclusions, findings which we ask the Court to consider as appropriate in this case, if it determines that this Commission, as a matter of law, was required to give the Director and the City of Jersey

City a fair and full hearing, and if it was also required to give effect to the wartime conditions, stabilization legislation, before it finally permitted the company to increase its fares over and above the fares in effect on September 15, 1942.

I appreciate your Honors' attention.

Judge McLaughlin: We will adjourn to 1:35 sharp, by this clock.

(Noon recess.)

[fol. 349] Afternoon Session

Judge McLaughlin: All right, Mr. Finerty, if you are ready.

Mr. Finerty: If it please the Court, we have a brief we would be glad to submit at this time, either with the understanding that all briefs are submitted now, or at the most that any replies be received by all parties by Friday, and the Court.

Judge McLaughlin: Well, first, all main briefs except yours have been handed the Court.

Mr. Finerty: Ours was just received here a short time ago.

Judge McLaughlin: That's fine. Well, if you wish, suppose you hand up your main brief and then we will work out about replies, if any.

(Copies of brief handed to the Court.)

Judge McLaughlin: Now, about replies,—can you hear me, Mr. Hershenstein? We are trying to get the brief situation crystallized. All briefs are in now. You have a copy of the Railroad's and of the Commission's?

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: The Interstate Commerce Commission's — With reference to reply, do you wish to reply?

Mr. Hershenstein: Yes, sir.

[fol. 350] Judge McLaughlin: To both those briefs, I take it.

Mr. Hershenstein: It will be a short reply, but I deem it necessary to reply, if your Honor please.

Judge McLaughlin: Well, today is Tuesday.

Mr. Hershenstein: Yes, sir.

Judge McLaughlin: Mr. Booth, you want to reply to both, too?

Mr. Booth: We want to review them, to determine how much of a reply we will need.

Judge McLaughlin: Very well.

Mr. Booth: We need a few days.

Judge McLaughlin: Well, I think, especially with you having to go down to Washington, that probably—today is Tuesday—probably Friday is a little bit soon. I think if we gave until Monday, it ought to be agreeable.

Mr. Hershenstein: That is satisfactory.

Mr. Booth: Yes, sir. I think the Interstate Commerce Commission, Mr. Reidy not being well, will probably not see our briefs until tomorrow or the next day.

Mr. Hershenstein: Shall we deliver them to the Court or mail them to your Honors separately?

Judge McLaughlin: Mail them to the Judges.

Mr. Hershenstein: Thank you, sir.

[fol. 351] Judge McLaughlin: The Judges; that is, the individual Judges.

Mr. Hershenstein: The individual Judges, yes, sir.

Mr. Booth: Will it be all right then, if it is agreeable that—Saturday; that means we would have to mail them on Friday, in Washington. Will it be all right if we mail them on Saturday?

Judge Fake: Oh, yes.

Judge Meaney: They would get here Monday, then.

Mr. Booth: So that if we mailed them on Saturday, they would get here on Monday.

Judge McLaughlin: All right.

Mr. Booth: Will that be satisfactory?

Judge McLaughlin: All right.

Mr. Booth: Thank you.

Judge McLaughlin: Go ahead, Mr. Finerty.

Mr. Finerty: May it please the Court, the most noteworthy impression the arguments of my opponents made on my mind, and I hope the Court did not fail to remark it, was that I do not think I heard either Mr. Hershenstein or Mr. Booth charge by so much as a single statement that the orders of the Interstate Commerce Commission here sought to be enjoined were without any evidence to support them; and I call your particular attention to the fact that in the amended bill—neither in the amended bill nor in the [fol. 352] intervening petition, is there any real charge to that effect. There is a perfunctory charge in the amended bill that the orders sought to be enjoined were without evi-

dence to support them, but the context of the bill itself shows plainly what was shown by the arguments of Mr. Booth and Mr. Hershenstein, that what they are quarreling with is the deductions the Commission drew from the evidence before it.

I am leaving aside for the moment now this question of fair and full hearing, which I will reach. But I desire to impress upon this Court that this amended bill, neither it nor any argument of counsel, goes to the extent of specifying a single respect in which there was not evidence to support the Commission's findings and orders of June 8th and November 2, 1943, here sought to be enjoined.

Now, Mr. Justice Fake will, at any rate, have no doubt as to why I call that situation to the Court's attention, because Judge Fake wrote the opinion here referred to this morning in 33 Fed. Supp. 495, refusing an injunction to the Hudson & Manhattan Railroad Company against the Commission's findings and order of July 11, 1938; and he based that opinion squarely on the proposition that there was evidence to support those findings and order, and I am [fol. 353] frank to say that to that extent the Supreme Court certainly upheld Judge Fake's conclusion. But what I want to impress on this Court is that our opponents, Jersey City, do not realize what a victory they scored there; because they established and they established beyond peradventure of a doubt, that if there is any evidence whatever to sustain the order of the Interstate Commerce Commission, it doesn't make the slightest bit of difference how much other evidence there may be against the order, it doesn't make any difference whatever what evidence the Commission may have disregarded on which it could have reached a different conclusion, it doesn't make any difference whether the Court would say that the Commission's conclusion even on the evidence it considered was right or wrong; the Court is without power under the holding of the Supreme Court of the United States in numerous cases but epitomized by its holding in the Hudson & Manhattan case, is without power to set aside an order of the Interstate Commerce Commission if there is any evidence to support that order. And Mr. Hershenstein in particular—his whole argument this morning is practically disposed of by Mr. Hershenstein's own brief in the United States Supreme Court, which was an extremely able brief; and I want to read from a

[fol. 354] footnote on page 10 of Mr. Hershenstein's brief in the United States Supreme Court:

"To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. The finding of reasonableness, like that of undue prejudice, is a determination of fact by a tribunal informed by experience. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

That's a direct quotation in Mr. Hershenstein's brief from the decision of the Supreme Court of the United States in Virginia Railway Company v. United States, 272 U. S. 658; and other cases cited by Mr. Hershenstein in undoubted support of that principle.

In Judge Fake's opinion, Judge Fake cited at page 457 of that opinion what the Supreme Court had said in Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. at page 549. There the court said:

"In this case the Commission had before it many wit- [fol. 355] nesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. * * *

"With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive."

Now, I don't know why I should be particularly concerned to argue, or to argue at length at any rate, to this Court that there is and was evidence before the Commission to sustain both its orders of June 8, 1943 and of November 2, 1943. Nothing has been said to the contrary here by my

opponents. And that, I point out to you, is their direct case and not a proper matter for rebuttal. Unless they have established to you on their direct case that there was no evidence before the Interstate Commerce Commission which could have supported those orders, then this Court is with-
[fol. 356] out jurisdiction to set aside those orders, or to enjoin them. Now, they made no attempt at any such showing. We have, however, in our brief, undertaken to refer the Court to the specific parts of the record before the Commission, the transcript and the exhibits, supporting each of the findings, the substantial findings, made by the Commission, and I will not take the time of the Court to review those. All I can say is that if this Court was justified, as the Supreme Court of the United States said it was, in holding that the Hudson & Manhattan Railroad Company could not enjoin the 8-cent-fare prescribed by the Interstate Commerce Commission in 1938, much more is this Court justified in holding that neither the City of Jersey City nor the intervenor can enjoin either the 9-cent fare authorized by the order of June 8, 1943 or the alternative fares of 11 tokens for a dollar or a cash fare of ten cents authorized by the order of November 2nd.

I assume that our opponents will, with better hindsight than foresight, come back now and in these reply briefs that they are going to submit to you by next Monday, will undoubtedly try to say to you that there is no evidence to support either of those orders. I undertake to predict, in fact I undertake to guarantee, that you will find they can
[fol. 357] make no such a showing truthfully, and that the farthest they can go is to say or to point out evidence perhaps in conflict with those orders, perhaps in conflict with the conclusions you yourself might have drawn from all the evidence; but that is not the question for this Court. The sole question for this Court and the sole ground upon which this Court can grant an injunction in this case, for lack of evidence, is that there is no evidence to support the Commission's order; and I say that the Court cannot make such a finding on this record.

Now, I therefore am going to pass what should be the main point of my opponents' case and go to the point they have chosen to make the main point of their case, for lack of a better one; and that is the repeated assertion, and I will say the repeated misrepresentation to you, that they

did not have a fair and full hearing before the Interstate Commerce Commission.

I think perhaps the best way of putting the situation before you is to do it chronologically. I think it was in June, 1942, the Hudson & Manhattan Railroad Company petitioned the Commission to reopen the proceedings so as to authorize a 10-cent maximum fare on its downtown line, representing to the Commission in its petition, and attaching to that petition, speaking of evidence, this bound volume [fol. 358] of evidence, that conditions had so changed since the order of the Commission of July 11, 1938, that it would now be appropriate for the Commission to reconsider its findings and order prescribing an 8-cent fare as a maximum fare, and authorize a 10-cent fare.

The City of Jersey City and the Hudson Bus Company and other bus companies objected to the reopening of the case, but the Commission reopened the case and set it for hearing, and it was heard in September, 1942.

Now, let me point out to you what occurred at that hearing. During the hearing the Office of Price Administrator sent a young man, Mr. Shapiro, to appear and intervene in the proceedings. This was during the hearing on the reopened order, and during the hearing underlying the Commission's order of June 8, 1943. He merely got up and said that the Office of Price Administrator was interested in the proceedings, indicated that their interest was in the question of inflation, but in answer to a specific inquiry by me stated they had no evidence to offer.

And let me say this: that from that day to this, the office of Price Administration, either in its own capacity or as a [fol. 359] representative of the Director of Economic Stabilization, has not offered one word of evidence on the question of inflation. On the contrary, the Office of Price Administrator has specifically admitted that they have no evidence to show that these increased fares and charges could be inflationary in themselves; and I call your attention to their statement to that effect on page 20 of the exceptions of the Price Administrator to the proposed report of Examiner Trezise in these proceedings. There the Price Administrator said:

"We did not nor do we now suggest that this proposed increase in fares will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

Now, what is the Office of Price Administration talking here about the failure of the Commission to protect the public interest against inflation?

The Office of Price Administration, if it has any duty in this case, and I will refer to that later, had the duty of offering evidence that inflation would result from these fares, if that were possible. Of course, it was utterly incredible that any inflation could result. The maximum, had we gotten all the 10-cent fare, the maximum increase would have been $12.58 a year for a passenger traveling six [fol. 360] days out of every week of the year both ways.

Now, considering the price increases that the Office of Price Administration has permitted, of course, it would be asinine to say that $12.58 would cause inflation; because, mark you, an increase in passenger fares has a deflationary tendency in itself. It takes money out of the commodity market. And if the Office of Price Administration had paid as much attention to economics as it had to theories of inflationary spirals, it would have known that the primary tendency of an increase in passenger fares was deflationary.

Now, we went into this question at some length in some of these briefs here, and I don't intend to burden the Court with any argument on economics in that respect. All I can say is that the sole contribution the Office of Price Administrator has made to this case on the subject of inflation is some theoretical inflationary spiral mentioned in his exceptions to Examiner Trezise's report, but not one word of evidence ever offered on the subject of inflationary spiral or any other kind of inflation.

So it comes with very bad grace for the Office of Price Administrator to attempt to read a lecture to the Commission on the protection of the public interest against inflation. If there is any inflation possible in this case then the [fol. 361] Office of Price Administrator hasn't shown what it was.

That gets me ahead of my story, however. What I started to say was that from the very inception of this case, the Office of Price Administrator showed no concern whatever with offering evidence of inflation, and never has offered any evidence of inflation. When the examiner's proposed report came out, and I want to call your attention to the fact the examiner's report, Examiner Trezise's——

Judge McLaughlin: That is January or February, isn't it?

Mr. Finerty: That's right; I think it is February. I am awfully sorry I am not definite on that date.

Judge McLaughlin: All right, that's all right. I just wanted it approximately.

Mr. Finerty: When that proposed report came out——

Judge McLaughlin: Excuse me. That's 1943, too?

Mr. Finerty: 1943.

Judge McLaughlin: All right. Go ahead.

Mr. Finerty: When that proposed report came out, the examiner recommended that the Commission find a 10-cent fare on the downtown line to be reasonable.

Now, to listen to Mr. Hershenstein and to Mr. Booth, you would have thought that the Commission had ridden rough [fol. 362] shod over the rights of Jersey City and the rights of the public, and had paid no attention to anybody's rights except apparently an idea of subsidizing the Hudson & Manhattan Railroad Company with unearned increment. The contrary is the fact. Examiner Trezise's very sound report, so sound that three Commissioners dissented, was overruled by the Commission, and the Commission held that a 10-cent fare had not been justified, and restricted the Hudson & Manhattan Railroad Company to a 9-cent fare on its downtown line as a maximum reasonable fare.

Now, that was the Commission's findings and order of June 8, 1943; and in those findings and order, the Commission overruled a report of an examiner supported by three Commissioners, saying that we were entitled to a 10-cent fare. Does that look as if the Commission were railroading out of the way any legitimate claim, any legitimate consideration to which Jersey City might be entitled?

And what happened as a result of that? Of course, Jersey City recognized that that was a victory, and we equally recognized it was a defeat; and Jersey City never made a move to ask any reconsideration of that order of June 8, 1943. As a matter of fact, she has never made a move yet to do it. What happened was this: We found our- [fol. 363] selves in a position where, though we got a 9-cent cash fare, we couldn't collect it; and don't let Mr. Booth and don't let Mr. Hershenstein or any of these other theorists tell you that we are throwing away a thousand dollars a day for the pleasure of throwing it away. If we could have collected a 9-cent cash fare, we would have been a thousand dollars a day or more better off, ever since June 8, 1943. It is not a matter, in the next place, for the de-

cision of this Court. The Interstate Commerce Commission says we couldn't collect a 9-cent fare, cash fare, and when they said that they overlooked the evidence in the record at the time they made their order of June 8, 1943, showing we couldn't collect a 9-cent cash fare. And that evidence was the evidence of Mr. Brown, the chairman of the board, who commented, as one of the reasons that we had not taken advantage of a technical opportunity to publish a 9-cent fare on the downtown line under the Commission's order ex parte 148. As your Honors will probably remember, ex parte 148 was a general railroad proceeding, in which the carriers were permitted to increase all their freight rates six per cent and their passenger fares 10 per cent. By error, without our authority, we were made a party to that proceeding, merely as a member of the Ameri-
[fol. 364] can Association of Railroads. That proceeding was based on certain labor awards that had been made against the steam railroads and did not apply to us, though as the record before the Commission shows, we had incurred substantially the same increases in labor rates. But, furthermore, it was the maximum which the railroads asked. Well, we knew that a 9-cent fare was neither the maximum we needed, nor could we collect it if we got it. And we point out—Mr. Brown pointed this out to the Commission in his testimony; but for some reason or other, the Commission lost sight of it in their decision of June 8, 1943, and gave us a 9-cent fare, an uncollectible fare.

The Commission's rules of practice, which are attached as an exhibit to our answer to the City of Jersey City, require that an application or that a petition for reconsideration, rehearing or reargument, be made within thirty days. Within thirty days we petitioned for a reopening of the Commission's order of June 8, 1943, only to the extent, and our words were only to the extent, of such necessary modification as will enable us practicably to comply with that order; and we pointed out that the only practicable method of compliance was by the charging of our alternate fares of 11 tokens for a dollar or a cash fare of 10 cents; and that un-
[fol. 365] fortunately for us, that imposed upon us the collateral necessity of applying those alternative fares on our uptown line, where the fare was already and had been for 23 years 10 cents. So it meant a reduction in fares on our uptown line, and it meant, and this record shows, a reduc-

tion in revenue below what the Commission had estimated we would earn under a 9-cent fare on our downtown line and a 10-cent fare on our uptown line under the order of June 8, 1943.

The City of Jersey City and the Price Administrator both filed answers to that petition, and in both those answers, and they filed them some time in the middle of July, it is true both of them suggested that they would like the Commission to reconsider the 9-cent fare. No petition. And any petition was barred under the rules of the Commission, as being too late. And, remember, they had waited until we petitioned to reopen. They were thoroughly satisfied with the 9-cent fare and they are thoroughly satisfied with it now. They waited until we petitioned, and then they came in with a general suggestion that the Commission should reopen the 9-cent fare authorized by the order of June 8. They made these representations in unsworn replies to our sworn petition, and the Commission, in place of doing, as the Commission had a right to do, under the [fol. 366] rules of practice, saying "We won't receive those unsworn replies," the Commission took their unsworn replies, gave full credence to everything said in them, and proceeded to issue their order of August 3rd, report and order of August 3rd, 1943; and that report and order of August 3, 1943, was founded from start to finish, except in one respect, by its own terms, on the record already before the Commission. In that order, the Commission pointed out that they had overlooked this evidence showing we couldn't collect a 9-cent cash fare, and they took the allegations of our petition in that respect, and allowed us 11 tokens for a dollar, or a cash fare of 10 cents.

Now, in that respect and in that respect alone, did the Commission's order of August 3, 1943, go beyond the record already before the Commission; and in that respect and in that respect alone, was Jersey City and possibly the Office of Price Administrator entitled to any hearing. The Commission pointed out that otherwise their order of August 3rd was founded entirely on the record already before the Commission. They said that, "In previously holding that a 10-cent on the downtown line was not justified, we had reference to a 10-cent fare for general use. We had no reference to it for an occasional passenger." [fol. 367] And it then pointed out certain fare comparisons, including the fares fixed in ex parte 148 and not

revoked, and not revoked, so far as fares of the character of the Hudson & Manhattan were concerned, by the subsequent order of the Commission; pointed out that a 10-cent fare for the casual passenger would be in their opinion reasonable.

Now, that was expressly founded on the record already before the Commission. As to that no one was entitled to a further hearing. As to the 9-cent fare, they expressly pointed out that in authorizing the 9 and 11-cent fare, that that was de minimus; that there was so little difference it couldn't be measured—certainly, within Judge Brandeis' sphere of reasonableness. And they further pointed out that under the order they were making, our revenue would be reduced under that which they had intended to accord us by authorizing a 9-cent fare on the downtown line by the order of June 8th.

If the Commission, I am confident of this, if the Commission had seen fit to go ahead and say, "These people had an opportunity to answer you on the one question which is not covered by the previous record, what character of tokens shall be used and their value"—if the Commission had seen fit to go ahead without any hearing, I am [fol. 368] confident that the Supreme Court of the United States would have said, "It is too immaterial and too trifling to require a hearing." But, as the Commission said, in an abundance of caution, they granted a hearing.

And why did they grant that hearing? Because Jersey City came in and filed its original bill in this court, asking in terms that the Commission and the Hudson & Manhattan Railroad Company be restrained from any departure from the Commission's order of June 8, 1943, and the 9-cent fare there authorized, and asked that we be restrained from collecting any fare in excess of 9 cents.

Now, if that isn't an estoppel, we in answer had pointed out that their sole real basis of complaint about the order of August 3, 1943, was that they didn't have a chance to cross-examine or offer rebutting evidence on this question of the use of tokens.

Now, the Commission reopened the proceeding and it reopened it within the terms of the bill filed in this court; assuming that bill was filed in good faith, assuming that the City of Jersey City and OPA wanted the 9-cent fare maintained, the Commission reopened to consider only that portion of the record which went beyond the record pre-

[fol. 369] viously before the Commission and that had to do with the modifications in the order of June 8, 1943, affected by the order of August 3, 1943, and that was the alternative fares of 11 tokens for a dollar or a cash fare of a dime. And having specifically set out that they wanted to introduce, Jersey City wanted to introduce, counter evidence and wanted to cross-examine, Jersey City came to the hearing on that order and introduced not one word in opposition, not one word of evidence in opposition to the token fares. It did cross-examine, and the conclusions to be drawn from that cross-examination are shown in the Commission's report and are matters for the Commission, most respectfully, and not for this Court.

Judge McLaughlin: Did you say they cross-examined?

Mr. Finerty: Cross-examined our witnesses at length, yes; but with full opportunity to do so, offered no evidence——

Judge McLaughlin: Just so that we get it clear——

Mr. Finerty: I beg your pardon?

Judge McLaughlin: Just so that we get it clear, cross-examined, Mr. Finerty, on the matters which you say the hearing was confined to.

Mr. Finerty: That's correct.

Judge McLaughlin: On the tokens?

[fol. 370] Mr. Finerty: Yes. OPA, though, as I will show later, with no proper interest in the matter, did undertake to offer some evidence on the propriety of the token fares proposed, and offered some evidence, considered by the Commission and discussed by them in their report of November 2nd, which OPA contended showed that our estimate of the potential user of tokens against cash fares was too high—another matter for the decision of the Commission, and before whom there was plenty of evidence on the question.

Now, there was the situation and there was what the Commission had been asked to do; and the Commission did exactly what it had been asked to do. It reopened the case to meet the objections made by the City of Jersey City in its original complaint filed in this court on September 13th, and it did it on September 18th, issued its order on September 18th.

Now, OPA didn't join in that bill, but OPA alleges in its petition of intervention here, and so stated in the hearing

before the Commission, that it would have joined in that bill if it hadn't been for this order of reopening of September 18th. Well, the order reopening of September 18th was clear on its face. In fact, the order originally was more restricted than the Commission finally carried [fol. 371] out. The order originally provided that there should be no briefs or argument. On the hearing before the examiner, the examiner gave the parties their choice of oral argument before him or briefs to be filed with the Commission. All parties chose to file briefs with the Commission. So as far as that phase of the order of September 18th is concerned, Jersey City got exactly what they wanted.

But what happened on that hearing? On that hearing, Jersey City and OPA, having asked that the Interstate Commerce Commission be required to abide by its order of June 8th, and the 9-cent fare there authorized, undertook to attack that order and tried to offer evidence to show two things. Mr. Eisen, and I am referring to page 14 of the intervenor's petition of intervention, attempted to offer evidence to show that there had been such an increase in the traffic of the petitioner by reason of war conditions, in the first six months of 1943, that we would earn our bond interest without an increase from the 8-cent and 10-cent fares at present in effect. That was rejected by the examiner on the ground that it went beyond the limited issues of the hearing; but Mr. Eisen was expressly advised that he might petition the Commission to broaden the order of September 18th so as to receive that evidence; and I call your attention to the fact that neither Mr. Eisen nor any- [fol. 372] body for Jersey City ever petitioned the Commission to that effect.

Mr. Booth, on the other hand, undertook to show and to offer evidence, to elicit evidence, as to the net income of the railroad Company, designed to show that we would earn more than Mr. Booth alleges the Commission fixed as a maximum we could earn under its order of July 11, 1938.

Now, those are in terms Mr. Booth's offer, and they are reproduced in his motion, his written motion, filed on October 15th with the Commission for the reopening of the order of September 18th, so as to permit this evidence to be received.

And in that connection, Mr. Booth referred to an income statement he had of the Hudson & Manhattan Railroad

Company, or alleged he had. Again, the examiner told Mr. Booth that that went beyond the scope of the Commission's order of reopening of September 18th, but if he desired to do so, it was his privilege to petition the Commission to reopen and broaden its order of September 18th.

Now, let me point out to you, the examiner, in doing that, gave both Mr. Booth and Mr. Eisen latitude to which they were not entitled under the Commission's rules. They were bound by the Commission's rules to petition for a [fol. 373] reopening affecting the order of June 8, 1943, within thirty days of that order, and here they were being permitted in September, in effect, to petition to receive evidence directed to the 9-cent fare authorized by that order.

Mr. Booth did file such a petition. He filed it, dated it October 14th, it was received on October 15th in my office, we answered it on October 25th, and in our answer we called attention to the fact that Jersey City had not petitioned to reopen the order of September 18th so as to permit an attack on the Commission's order of June 8, 1943, and we said that they didn't dare do so, because to do so would have stultified their original complaint then pending unamended in this court as of that date.

Jersey City apparently with a half-hearted courage but too late, on September 26th, the day after our reply had been received——

Mr. Halloren: October 26th.

Mr. Finerty: —October 26th, filed or sent a letter to the Commission, with copies to the other parties, attempting to adopt the petition of OPA to reopen and broaden the order of September 18, 1943. It did not comply with the Commission's rules either as to form or content or service, [fol. 374] as to petitions for reopening, and the Commission disregarded it, and rightly disregarded it. But the Commission did give consideration to the petition of OPA.

Now, let me call your attention to what OPA wanted to introduce.

Judge McLaughlin: Excuse me. I don't want to interrupt you, Mr. Finerty——

Mr. Finerty: Yes.

Judge McLaughlin: —but while we are on that, did the Commission advise Jersey City that it was disregarding it, or is that just the effect of what they did?

Mr. Finerty: That would be the effect. As a matter of practice——

Judge McLaughlin: There was no actual order or anything like that?

Mr. Finerty: As a matter of practice before the Commission, where an informal application of that sort is received, it is filed as correspondence and not——

Judge McLaughlin: There is no answer to that?

Mr. Finerty: No. The parties are supposed to know what the rules require.

Judge McLaughlin: All right. Go ahead.

Mr. Finerty: Now, attached to the petition of intervention of OPA, on page 25, is Exhibit B. Now, curiously [fol. 375] enough, this Exhibit B is attached to the petition of intervention, but was never attached to the petition for reopening filed by OPA with the Interstate Commerce Commission. OPA's petition to the Interstate Commerce Commission violated, itself, every rule of the Commission, in failing to specify the evidence which they desired to adduce, and in failing to do more than state the conclusions of the pleader as to what that evidence would show. But this Exhibit B is a statement which OPA represented to be a statement of the net income of the Hudson & Manhattan Railroad Company from railroad operations. They knew at the time they offered it that it was no such thing. They got it from me, and they knew it was a consolidated statement of the corporate income, including the income from the Hudson Terminal Buildings, 30 and 50 Church Street, New York City; and they knew that that statement was of no probative value whatever to the Interstate Commerce Commission. And they knew, moreover, that the Interstate Commerce Commission had had that very statement before them on OPA's unsworn answer to our petition for reopening of the order of June 8th.

I call your attention to page 51 of the amended bill.

[fol. 376] Mr. Hershenstein: What page is that, Mr. Finerty?

Mr. Finerty: Page 51, the last paragraph; referring to exactly similar figures for four months instead of six months:

"The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first five months of 1943."

There was six months that they attempted to offer.

"The deficit"—in quotes—"so shown is $75,798, and for the twelve months of the year would be $181,915, which according to this protestant would leave available $1,203,685 for interest on the income bonds, equivalent to 4.34 per cent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 per cent, as we estimated would result from the amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the deficit"—

That same argument was made here, the same argument that was made in the petition to reopen, the order of October 18th, that we didn't need any increase, because of these earnings.

—"It is apparent, however, that the deficit and other re-
[fol. 377] sults given for the five-month period are not for railroad operations only, but also include the operation of respondent's terminal building and therefore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior reports is based was closed."

Now, what sort of good faith is there in trying to foist on this Court a representation that the Commission arbitrarily rejected, without good reason, an exhibit showing our revenues, allegedly showing our revenues, which would have caused the Commission, presumably, that must be their argument, had it been received, to have revoked the 9-cent fare authorized by order of June 8th.

Well, the answer is twofold. The offer isn't in good faith. OPA knows perfectly well that that exhibit was of no value whatever to the Commission. It was offered as a blind there; it is offered as a blind here. Moreover——

Judge Fake: Offered as a what?

Judge McLaughlin: As a blind, b-l-i-n-d.

Mr. Finerty: Moreover, if it had been true, it wouldn't have caused the Commission and shouldn't have caused the Commission, and this Court couldn't require it to cause the
[fol. 378] Commission, to change its conclusions in any particular. There is nothing limiting the Hudson & Manhattan Railroad Company to earning what the Commission said it might earn if it were lucky; and it wasn't lucky; under the Commission's order of July 11, 1938.

That was the purpose for which Mr. Booth in his petition to the Commission for reopening wanted to offer this evidence. Far from earning what we were supposed to earn under the Commission's order of July 11th, which they then calculated would be some $541,000 less than our bond interest, we never earned within $800,000 of our bond interest under that order, up to and including the time of our filing our petition for reopening in 1942. We have piled up a deficit in accrued interest on income bonds, under the Commission's order of July 11th, of over five and a half million dollars, and before we can ever pay a cent of dividends, we have to pay off that accrued interest on those income bonds. And we have a legal right to earn that accrued interest, and if the Commission gives us revenue to pay it, neither this Court nor any other court can review the Commission on that question.

So what does this talk about a denial of a fair hearing come to?

[fol. 379] The Commission rejected incompetent evidence directed to an incompetent ground. And yet—I told you that it had been unfair. It wasn't the Court's fault. But the argument on the interlocutory injunction had an unfair result to the Hudson & Manhattan Railroad Company, which I hope to have dissipated in some degree this afternoon, that ever since that argument, and all day, and probably until now, you have been under the impression that the Interstate Commerce Commission has arbitrarily refused to bring this record up to date, has arbitrarily excluded evidence that must have changed their opinion, and if it didn't change their opinion, would have warranted you in changing it, none of which is a fact. The Interstate Commerce Commission on the oral argument of this case in April, 1920, received——

Judge McLaughlin: 1920?

Mr. Buck: 1943.

Mr. Finerty: April 20, 1943, received in evidence, a most unusual thing for them to do, with our consent, received in evidence what is here a stipulation, showing the results of increased traffic on the Hudson & Manhattan Railroad Company for the first three months of 1943. This was obtained by Mr. Eisen, and he asked me if we would object to the Commission having that to bring them up to date on the [fol. 380] increase in our traffic. I said we would not, and the Commission received it in evidence. The Commission

had before it at the time it made its order of June 8, 1943, Mr. Eisen's estimates based on a projection of that evidence for the year period; and the Commission, in its conclusions, in its report of June 8th, mentioned that evidence and found as a result of it that it was reasonable to suppose that our traffic would increase a certain percentage; and on that percentage we would earn a certain amount of money. It developed that it increased more than that. The Commission had those additional figures before it when it issued its order of November 2, 1943. The traffic figures were brought up to date for the first eight months of 1943, before the Commission. This record is not stale. This record is right up to date, and up to date on a point where all parties and the Commission have made estimates as to what would be the result of the various fares applied to the estimated traffic for 1943, and you will find those figures in the Commission's reports of June 8, 1943, of August 3, 1943, and of November 2, 1943.

I have never heard more misrepresentation of a record before the Commission than has been indulged in here, as to the Commission's action. The Commission has sedulously [fol. 381] guarded every right of Jersey City, and the gratitude they have received is being accused publicly in the press of having trampled on them.

Judge Fake: Of having what?

Mr. Finerty: Having tramped on the rights of Jersey City.

Now, I revert to what I started with, and that is that you may disagree as much as you like with the conclusions the Commission has drawn from the evidence before it, you may think that other conclusions might have been drawn, you may have thought the Commission disregarded certain evidence, but unless you can say that there is no evidence before the Commission to support the orders, you must deny this injunction.

Now, I want to refer very briefly—I don't want to disappoint Mr. Booth nor the Court, because I think it will be informative; I do want to refer to what the Circuit Court of Appeals had to say about the attitude of the Office of Price Administration in cases of this nature, and that's in the Washington Gas Light case, 137 Federal (2d) 547; and, curiously, that case is so on all fours with this one, in the method used by the Office of Price Administration, that it is

almost incredible they are not talking about this case, when you read the opinion.

[fol. 382] In that case, as in this case, Mr. Booth, or his cohorts, went before the Public Utilities Commission and intervened under an order permitting—pardon me. They first went before them prior to the Act of October 2, 1942, in their own capacity, for OPA; as the court said, on page 358 of that opinion, their capacity then being essentially nothing different than their capacity now. That was to prevent inflation. In that capacity they did there as they did here, offered not one word of evidence, and a whole lot of arguments.

Mr. Booth: That isn't true, Mr. Finerty.

Mr. Finerty: I beg your pardon.

Mr. Booth: The court found——

Judge McLaughlin: Wait a minute, now, Mr. Booth.

Mr. Booth: I am sorry.

Judge McLaughlin: You will have an opportunity to reply.

Mr. Booth: All right. Pardon me.

Judge McLaughlin: Go ahead, Mr. Finerty.

Mr. Finerty: Then, the court having permitted their intervention under the Act of October 2nd, and they having exercised their rights under that Act, including rights that the court found they didn't have, of attacking the so-called sliding scale on utility charges, the Price Administrator [fol. 383] took the position that the Commission had denied them their day in court, because the Commission wouldn't open up the whole question of the legality of the fares or of the rates prescribed by the Public Utilities Commission; and the Circuit Court of Appeals said that the Office of Price Administration had no such standing in court, that its standing was confined to the question of inflation, that on that question they were entitled to a hearing but they were not entitled to dictate to the Public Utilities Commission there, and they would *would* say here to the Interstate Commerce Commission, what the scope of a hearing before an administrative body, charged with the enforcement of an administrative act, should be. And so long as they were heard before that body, on the issue in which alone they were properly interested, they had no ground to complain.

Now, I am not going to try to read you the opinion, but it is curiously apposite here. It couldn't be more on all fours,

both as to the attitude of the OPA and as to the procedure involved there and the procedural questions involved there.

Judge Meaney: Is that cited in your brief, Mr. Finerty?

Judge McLaughlin: Well, it is in the briefs, that Washington case.

[fol. 384] Mr. Finerty: I haven't seen the brief, so I don't know.

Mr. Booth: It is cited in Mr. Finerty's brief.

Judge McLaughlin: All right. It is in all the briefs, I think, on the interlocutory injunction, too.

Mr. Finerty: When I say I haven't seen it, I haven't gone sufficiently far through it to know whether that's included.

Now, I don't want to labor this question much further. I want to point out another thing which puts Jersey City and the Office of Price Administration out of court, or should put them out of court, in addition to the estoppel created by the original bill of complaint here, asking that the order of June 8th be maintained; and that is their failure to exhaust their administrative remedies. Jersey City up to date has never filed any petition for rehearing of any of these matters. It wasn't from any lack of being warned by the examiner. It simply was for the reason we assign. Jersey City felt she couldn't safely do it, as long as her unamended bill was pending in this court. Her amended bill, you will remember, attacks the order of June 8, 1943. But at the time that she had to file her petition for a rehearing with the Interstate Commerce Commission, in September, [fol. 385] 1943, her amended bill had not been filed, and her unamended bill specifically asked that the Commission's order of June 8th be enforced.

Now, in addition to that, in addition to estoppel, there is the ordinary rule, I think the cases are cited in our brief, the Myers' case, a very recent decision of the Supreme Court of the United States, saying that as an ordinary rule resort cannot be had to the courts until there has been an exhaustion of administrative remedies.

For once, this court is on the side of the angels, and I want to read a decision of this Court to the same effect, in Board of Public Utility Commissioners of New Jersey v. United States, at 21 F. Supp. 543, 1937. In that case a suit was brought to enjoin an order of the Interstate Commerce Commission invalidating intrastate freight rates fixed by the board. The board contended inter alia that the Commis-

sion's order was not supported by proper findings. This Court said, page 549:

"All parties to the proceeding are entitled to file their exceptions to the proposed report, and as matter of practice the Commission accepts as sound and accurate, and as supported by the evidence, all findings of fact in the proposed report to which no exceptions are made. In the instant case [fol. 386] plaintiff filed exceptions but made no objection as to the sufficiency of the findings. Under the Commission's Rules of Practice (Rule XV)"—and our Rule 101—"it is permissible for any party, after decision, to apply for a rehearing for the taking of additional testimony, for reargument, or for reconsideration. Plaintiff did not apply to the Commission for rehearing in this case. By petition for such rehearing the way was open to plaintiff to urge upon the Commission the argument which it now presents for the first time to the court as to alleged insufficiency of the findings. It should have exhausted its remedies before the Commission before appealing in this respect to the court."

And the court dismissed the bill.

Judge Fake: What's that citation?

Mr. Finerty: That is Board of Public Utility Commissioners of New Jersey v. United States, 21 F. Supp. 543.

You will pardon me a moment.

Judge McLaughlin: Certainly.

Mr. Finerty: Mr. Buck and Mr. Halloren call my attention to a matter that perhaps should be commented on to the Court. That is the suggestion that the order of June 8, 1943 [fol. 387] in terms provides that it shall be subject at any time to a petition for a reopening. It should be understood that that order has never become effective and therefore that that provision of the order has never had a chance to become applicable. In other words, we have never been able to publish the fare of 9 cents accorded us by that order. So that it will be time enough—and incidentally, of course, it does afford additional answer to their whole bill for injunction; I mean any necessity for injunction. Just as soon as that order becomes effective, under its terms, if these people can show that we are not entitled to a 9-cent fare, or a 9 and 11-cent fare, or the alternative, a cash fare of 10 cents, they have under that order their rights protected; they can come in the next day and ask the Commission to

reopen the case, and I have no doubt the Commission would entertain a petition. What they did on it would depend on what showing they made, and it would have to be a better showing than they have yet made on any of their efforts in this case since that order was entered.

I just want to say in closing that I can't see how an injunction can be granted in this case without disregarding the undoubted rule, that where there is any evidence to support an order of the Commission, the court may not en- [fol. 388] join it; and I do not see how any injunction can be granted in this case based on any theory of a denial of full and fair hearing, but I think it would be a most lamentable thing, in view of the fact that there was pending before this court an original bill of complaint which acts as an estoppel on this amended bill of complaint, for this court to entertain the amended bill of complaint and grant an injunction on it.

Thank you.

Judge McLaughlin: All right. Now, how about reply? Do you want to reply, Mr. Hershenstein?

Mr. Hershenstein: I desire to make a short reply.

Judge McLaughin: I think ten minutes ought to be sufficient.

Mr. Hershenstein: Supposing we take fifteen minutes.

Judge McLaughlin: I beg your pardon?

Mr. Hershenstein: Not over fifteen minutes.

Judge McLaughlin: Go ahead.

Mr. Hershenstein: Mr. Eisen——

Judge McLaughlin: Did you hear me say ten minutes?

Mr. Hershenstein: I heard you say ten minutes.

Judge McLaughlin: Did you? All right.

Mr. Hershenstein: I asked for the extra five minutes.

[fol. 389] Mr. Booth: May I have five or ten minutes also?

Judge McLaughlin: Yes, Mr. Booth.

Mr. Eisen: If your Honors please, at the very outset, so that there may be no dispute with respect to the issues, we agree wholly with the statement of Mr. Finerty that the principal issue herein is the determination by this Court as we have set out in paragraph 30 of our bill of complaint, whether or not the Commission's orders were arbitrary and capricious, without foundation in law, based upon errors of law, and without adequate findings or any evidence to support them, and contrary to the evidence of record.

We submit, if your Honors please, that the findings of the Commission herein involved are without any evidence to support them, as I shall shortly show. At the very beginning, it is clear that the Interstate Commerce Commission, being an arm of Congress, has no powers other than those specifically delegated to it, and those powers are as set forth in the Interstate Commerce Act. Any action by the Commission undertaken by it beyond the scope of the powers specifically delegated to it is null and void.

To go back, the original basis for this entire proceeding was a tariff published by the Railroad on September 1, 1937, [fol. 390] wherein a fare of 10 cents was proposed. Upon protest, alleging a violation of two sections of the Interstate Commerce Act, that tariff was suspended, and those proceedings were instituted. That allegation was that the 10-cent fare violated Section 1 of the Act; in other words, that it was excessive, arbitrary and unreasonable and therefore illegal. Secondly, that it was unduly preferential and prejudicial, in violation of Section 3 of the Act.

Realizing their inability to contest that allegation, the Hudson & Manhattan Railroad sought refuge under a third section of the Act, Section 15a (2). Now, that's the only section with which we are here concerned. That section is known as the revenue section of the Act. It is brief and I shall read it:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service;"—and this is the important part of it—"and to the need of revenues sufficient to enable the carriers, under honest, econom- [fol. 391] ical and efficient management to provide such service."

The plea of the railroads to the Commission was a need for more revenue. Now, that was the only issue in the case, because on precisely the same factual situation as exists in this record today, the Interstate Commerce Commission in 1938, this Court and the United States Supreme Court, unequivocally found that a 10-cent downtown fare based on the record as still exists today was in violation

of Section 1, was unreasonable, was in violation of Section 3, unduly preferential to the uptown patrons and unduly prejudicial to the downtown patrons.

There being no changed facts in the record, those findings are res judicata with respect to Sections 1 and 3. All we have left is Section 15a (2). Before relief can possibly be accorded under that section, the Commission is required to make two fundamental findings; one with respect to revenue. What do we mean by that? A determination, (a): Does the carrier need more money? (b) How much more money does it need? (c) How should that money be allocated? The additional revenues—who should bear that?

That is the first finding the Commission is required under the law to make.

The second finding is, is the railroad efficiently and eco- [fol. 392] nomically managed, to warrant the prescription of the additional revenue?

Now, at the hearings herein, and incidentally, we take the position, and I think we are well supported in law, as our brief will show, that the Commission has no other alternative, no other basis upon which to prescribe increased revenue. There is nothing in the Act that says the Commission can depart from all of the Congressional requirements and award a carrier increased revenue merely because the carrier has an accounting disability. There is nothing in the Act that says the Commission can set down any fare and say, "Let's see; does an 8-cent fare produce less revenue than a 9-cent fare? Does a 9-cent fare produce less revenue than an 11-cent fare?"

If that were the only basis, of course, any increased fare would produce more revenue. That isn't what the Act says. That isn't what power the Commission has. The Commission must first determine, Does the carrier need revenue? How much? And against whom should it be charged?

Now, at the hearing beginning September 28th, we were told, "We are not interested in revenue in this proceeding. The only purpose of this proceeding is to determine, will [fol. 393] more revenue accure to the carrier under the alternative basis herein proposed, or under some other figure, the 9-cent fare theretofore prescribed.

There is nothing in the Act that gives the Commission the right to authorize an increase predicated wholly and solely on that fact.

We sought to introduce evidence to establish the revenue requirements. In order to establish revenue, you must determine, first of all, what is the patronage. I have heard Mr. Finerty say five or six times that the traffic figures were introduced. What he didn't tell you was that the complete traffic figures were not introduced. True, they sought to submit certain abstracted figures, their local traffic; but the interline traffic, a very, very essential consideration, was never included in those traffic figures submitted to the Commission. We sought to submit the complete picture. We had a witness, Mr. Finerty said we offered no testimony, we had a witness in Washington, a traffic expert, who would testify to those things. The examiner clearly indicated that that evidence would not be admitted. I was compelled to make an offer of proof, indicate that the witness was there, that had I been permitted, that testimony would have gone into the record. That's the reason we offered no [fol. 394] proof We couldn't start with our proof.

Point 2: In order to determine whether the carrier needs revenue, you must determine, in addition to its intake, its income, what its expenses are. When we sought to question the accounting witnesses of the Railroad with respect to its expenditures, we were told, "This is beyond the scope of the hearing. You can't go into that."

Well, then, what revenue does the carrier need? There is nothing in the record that will support any such finding. The Commission precluded itself, because of the record, from making any finding as to revenue, or the amount of the revenue.

Now, in 1938, when the case was before the Commission and the courts, the Commission authorized the carrier to increase its fare to 8 cents, and coupled with that authorization, made this finding, which was affirmed by the courts. That authorized increase would produce some $541,000 less money than the carrier indicated it needed, and the Commission said to the carrier, "If you feel that you need more revenue, go to your interline traffic."

Now, in determining the allocation of this revenue needs, if any revenue needs exist, what proportion should the interline traffic now bear?

[fol. 395] We were prepared, had we been permitted to go ahead, to show that in 1943, for the first six months of 1943, the joint or interline traffic was almost 60 per cent

over that of 1941. Obviously, there would be some different allocation under the increased patronage. The Hudson & Manhattan Railroad says that one of the basic needs for the increased revenue they are here seeking is the necessity therefor as a result of increased wartime traffic. The principal increase in their wartime traffic is an interline revenue. Yet, we were precluded from establishing that fact. Therefore, we cannot establish the first——

Judge McLaughlin: Wait a moment.

Mr. Eisen: I am sorry.

Judge McLaughlin: Mr. Finerty, do you take the position that you can't go to your interline carrier, the Pennsylvania, for example, for a greater proportion of fare, until this particular rate hearing is out of the way?

Mr. Finerty: We have taken that position, your Honor, before the Commission, and the Commission has so found.

Judge McLaughlin: Very good.

Mr. Finerty: Our position is that with an 8-cent fare, we cannot get more than our 7.56 present division.

[fol. 396] Judge McLaughlin: All right.

Mr. Eisen: What Mr. Finerty didn't also answer is the fact that——

Judge McLaughlin: Wait a minute. Sit down, Mr. Finerty. That's all; thank you.

What have you to say as to that?

Mr. Eisen: There are three basic fares—divisions, I should say. There is a division between downtown New York City and New York City in which the Hudson & Manhattan receives five cents. Mr. Finerty hasn't referred to the 5-cent division, which is three cents less——

Judge McLaughlin: Wait a minute; wait a minute. Judge Fake thinks perhaps I haven't made myself clear to you. What is your position with reference to whether or not the Hudson & Manhattan could go to the Pennsylvania for an increase in its share of fare from the Pennsylvania, and not be bound by this decision?

Mr. Eisen: They couldn't possibly be bound by this decision, your Honor, because they have a directive from the Commission, they have a directive from the court, and the Supreme Court, saying that they should obtain additional revenue.

Judge McLaughlin: All right. Now, just one more question, and then go along.

[fol. 397] Mr. Finerty says that the Commission, the Interstate Commerce Commission, has so ruled, that the Hudson & Manhattan can't go to the Pennsylvania, if I understood him correctly, for more money unless this rate is raised.

Mr. Eisen: Directly the opposite.

Judge McLaughlin: Wait a minute.

Mr. Eisen: Oh. I am sorry.

Judge McLaughlin: Go ahead, Mr. Finerty.

Mr. Finerty: In its orders of June 8th, its orders of August 3rd and November 2nd,——

Judge McLaughlin: This year?

Mr. Finerty: — the Commission specifically recognizes that one of the reasons for allowing us our increase in rate was our representation that it would enable us then to go to the Pennsylvania for increased charges, and I think I am correct in saying that in one of those orders it recites the fact that we have already approached the Commission, based on the order of August 3rd. I may be wrong in that.

Judge McLaughlin: All right.

Mr. Finerty: But it is in this record here some place.

Judge McLaughlin: All right. Very good. Go ahead, Mr. Eisen.

[fol. 398] Mr. Eisen: It is a fact, your Honor, that all of the records of the Commission, even down to date, still carry that directive to the Hudson & Manhattan Railroad to seek additional revenue from the interline traffic. And I would like to call attention, while we are on that traffic, to this one fundamental fact, to show the dereliction of the Hudson & Manhattan Railroad with respect to the divisional feature. They are supposed to get 40 per cent of the revenue derived from the joint line traffic. In February of 1942, as a result of this ex parte 148 you have heard so much about, the joint line fares were increased 10 per cent. The Hudson & Manhattan Railroad to this day has not obtained a single penny of that 10 per cent increase. We estimated and tried to establish on cross examination that their proportion of that increase alone would be over $500,000 a year. We have been precluded from so establishing.

Mr. Finerty: If the Court please,——

Judge McLaughlin: All right. Go head, Mr. Eisen.

Mr. Eisen: Now, you have in the record, therefore, or I should say the record fails to contain therein, any basis

for the Commission for making a finding as to what revenue, if any, the carrier needs, how it should be allocated. You also, as a result of the divisional matters, the inability [fol. 399] or the lack of desire of the Hudson & Manhattan Railroad to secure its proportion of the ex parte 148 increase, its lack of desire to follow an admonition of the Commission made, I think, in 1923, to increase the downtown local division of five cents, which they have never bothered with, it is the lowest division they have—they are asking for a 10-cent local fare on precisely the same service that they get five cents from the Pennsylvania Railroad, and out of that five cents they pay back a good proportion of it in alleged easements. Now, prior to the increase——

Mr. Finerty: If the Court please——

Judge McLaughlin: Mr. Finerty, you will have a chance for a short reply, if you want it.

All right, go ahead, Mr. Eisen.

Mr. Eisen: Prior to the increase resulting from the Commission's order of July 11, 1938, you had a division on the downtown line which exceeded the local rate. Now, since the local rate went up, as a result of the Commission's order of July, 1938, to 8 cents, in connection with the 7.64 division, the Hudson & Manhattan says, "We cannot with propriety go to the Pennsylvania Railroad and ask them to pay a greater division than we exact from the local patrons."

Now, if, when the local fare were increased two cents in [fol. 400] 1938, the Hudson & Manhattan had sought and obtained an increase in its divisions, it could have maintained the pre-existing parity by a two-cent increase in those divisions. Now, the record being incapable of supplying figures upon which to predicate—the decision by the Commission—a revenue conclusion, Section 15a (2) cannot be invoked. There is no evidence to support any finding that the carrier needs revenue, the amount of revenue, or that the carrier is efficiently managed. Therefore, what can the Commission do? It can only go back to Sections 1 and 3, which, as I indicated, already condemn the 10-cent fare.

Now, we have been accused of misrepresentation to the Court. We have been accused of doing various bad things in connection, first of all, with the decision of June 8, 1943. You will recall perhaps from the argument on the inter-

locutory injunction that that decision of June 8th affirmed the finding that the 10-cent fare was unreasonable, directed the carrier to go to its interline traffic for additional revenue, but stated that because all the railroads in the country had been authorized to increase their fares, passenger and freight, the Commission would do likewise with the Hudson & Manhattan. However, since that decision, as was indicated, the ex parte 148 increases have been removed with [fol. 401] the exception of long distance passenger fares, the retention of the increase in that case being necessary to the war effort. Furthermore, the decision of June 8th closes with the statement that if at any time any of the parties to the proceedings desire to show changed conditions, they will be given an opportunity to do so.

At this further hearing conducted by the Commission on September 28th, we sought to show the changed conditions. We were precluded from doing so. The Commission pre-judged what would happen if that evidence came along. We had a clear indication of the attitude of the Commission. To file petitions or to do otherwise, as was indicated and clearly indicated, would have been merely a vain act.

Now, when the case was reopened on September 28th, there was no materiality in the evidence as to whether the tokens would be used 90 per cent or 10 per cent or 5 per cent or any percentage. The only issue before the Commission then, as was before the Commission throughout, was whether the Commission would act under Section 1, Section 3, or Section 15a (2). And there is nothing in Section 15a (2) which will give the Commission the right to authorize a fare increase or passenger increase on any basis other than that I have indicated: a passenger—or [fol. 402] a revenue need and efficient, economical, management.

Now, Mr. Finerty has indicated that at that reopened hearing we cross examined the witnesses at length. Every time we endeavored to cross examine——

Judge McLaughlin: Mr. Eisen, apparently you have gone to another point now.

Mr. Eisen: Yes, sir.

Judge McLaughlin: And we don't like to interrupt, but just to get this clear, is it your idea that the Hudson & Manhattan at that hearing, or at these hearings, in '43 haven't shown any need for revenue, increased revenue?

Mr. Eisen: No, sir, they have not.

Judge McLaughlin: All right.

Mr. Eisen: That's the point I make. We——

Judge McLaughlin: Well, we are clear on that. That's what you said.

Mr. Eisen: That's right.

Judge McLaughlin: And that's argued at some length in your brief, is it?

Mr. Eisen: I think it is, yes, sir.

Judge McLaughlin: Well, the point is, how, for example, in the order of June 8, 1943, where the fare was increased to 9 cents,—how did the Commission increase from 8 to 9 [fol. 403] if there was no proof, no evidence, no testimony, of a need for increased revenue?

Mr. Eisen: That increase it prescribed in the June 8th order flowed principally from the ex parte 148, an indication that all roads in the country had gotten a 10 per cent increase; the Hudson & Manhattan could have gotten it if they had so desired; and that therefore they should take it in accordance with that order.

In the August 3rd and November 2nd cases there was absolutely no attempt to show revenues whatsoever. The Commission circumscribed the issue to determine whether the 9-cent fare prescribed on June 8th would produce more revenue, or whether the token basis, the alternative basis of tokens, with the 10-cent fare, would produce more revenue. That was the issue set up in the reopened hearing. We couldn't proceed beyond that.

Judge McLaughlin: On the ex parte 148, there is no question but that the Hudson & Manhattan was entitled to that increase if they had taken it? Or is there any question?

Mr. Eisen: There is no question about that at all.

Judge McLaughlin: All right.

Mr. Eisen: Except that these increases have since been [fol. 404] lifted.

Mr. Finerty: That is not so.

Judge McLaughlin: Mr. Finerty, you will get a chance to talk.

Mr. Finerty: I will never catch up with these misstatements.

Judge McLaughlin: All right. Make a note of them.

Mr. Eisen: The ex parte 148 increases on freight were

lifted, and on all passenger fares, other than long-haul passenger fares, on commuter fares, and on intrastate fares, they were lifted; and this is commuter traffic.

Now, we have heard that we were given an opportunity to cross examine witnesses at length, for further hearing. Yes, we were given an opportunity if we had confined our cross examination to this issue, that had no materiality.

Judge McLaughlin: Mr. Finerty said that. There is no debate on that.

We have interrupted you a minute or so, Mr. Eisen, but I think you are about finishing up now, aren't you?

Mr. Eisen: Yes, sir. I think I have completed, your Honors. Thank you.

Judge McLaughlin: All right. Suppose we take a recess for about three minutes.

[fol. 405] (Following a short recess at this point the hearing was resumed as follows:)

Judge McLaughlin: All right, Mr. Booth.

Mr. Booth: I find it, of course, extremely difficult to understand the suggestion of counsel for the company that their right to divisions, greater divisions, on the interline traffic with the Pennsylvania Railroad, is dependent upon a further increase, in view of the clear and unmistakable statement of the Commission in the July 11, 1938 order, where the Commission, in closing its order, stated:

"If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic."

That, of course, was in 1938, and the company had all these years to do it; and the Commission's directions were, of course, predicated upon the 8-cent fares.

Now, counsel for the company apparently has suggested that the only question that's involved here, except for the question of fair hearing, is the question of whether there is any evidence to support the Commission's conclusions. We, like the City of Jersey City, in our complaint, specifically alleged that the Commission's orders were entered without any supporting evidence. But it might be of interest to the [fol. 406] Court to note an opinion handed down by the Supreme Court on December 3rd, involving an I. C. C. case,

referred to by counsel for the I. C. C. The court's opinion in that case closes with these words:

"The rule is too well settled to admit of any doubt that a finding by the Commission supported by substantial evidence must be sustained."

Now——

Judge McLaughlin: Is that the Hoboken case?

Mr. Booth: I think so. Hanna Furnace Company v. United States, decided on December 3rd.

Judge McLaughlin: All right. Go ahead.

Mr. Booth: There were two decisions handed down on that day. I am not sure which one it is.

Now, with respect to the participation of OPA in the case, and the question of the legal effect of the Act of October 2nd, the closing portion of the brief of the Commission indicates that the Director, or the Price Administrator, was given the right to intervene, and he availed himself of it; and having lost out in the Commission, it would seem that the Director might well have accepted the conclusion of the Commission and not try to do indirectly what he cannot do directly, namely: have any say as to the reasonableness of common carrier rates.

[fol. 407] Well, that, like the position of counsel for this company, is predicated upon a complete misunderstanding and misapprehension as to the additional legal duty of the Commission, imposed by the wartime conditions and the stabilization legislation, to show their fixing of rates under wartime conditions meets proper standards of wartime conditions, and gives full effect to the stabilization legislation; and as—even in the majority opinion of the Court of Appeals in the Gas case, as when the court reads the opinion, the Court will note, even as to the one and one-half per cent increase that was involved there, this being a 13 and a 25 per cent increase over and above the rates in effect on September 15, 1942, the court apparently found that the Commission had given effect to the stabilization legislation.

There is nothing in this opinion or in the opinions of the Commission under attack here which indicates that the Commission has reduced the amount of the rate increase that the company sought in any way due to the effect of the wartime conditions and the need for keeping down the cost of living. Now counsel for the company says we didn't offer any evidence as to inflation. It wasn't any of our busi-

ness to offer any evidence as to this token fare problem. [fol. 408] Now they presented an unsupported statement to the effect that 90 per cent of the people, the riders, would buy tokens. They say that we have no interest in the question as to the number of people who would probably pay a 25 per cent increase in fares, over and above the fares in effect on September 15th, and the only evidence on the whole question of token fares that had any scientific foundation, or was a study that was based upon the experience of the traction industry, was the exhibit that we offered and submitted into the record, and that was a study of the American Transit Association, and that showed clearly the traction companies as a rule, generally speaking, as a matter of fact, without any exceptions, never have found it practicable to use the kind of token fare structure that was adopted by the Hudson & Manhattan Railroad in this case. And in that connection, I want to read just one portion of the testimony in 1942——

Judge McLaughlin: This is with reference to what, Mr. Booth?

Mr. Booth: Token fares; a statement by the general superintendent. The examiner asked the general superintendent of the company:

"Well, your testimony is to the effect that the selling of tokens would not be advantageous to the company, either from an economical standpoint or from a practical stand- [fol. 409] point, isn't that true?

"The Witness: That is correct."

Now, there was the general superintendent over a year ago, pointing out that the idea of the token fares was impractical, as far as the traction industry is concerned, and yet the Commission accepted without any support a mere general statement of an officer, that 90 per cent of the people would buy tokens under the proposed token fare structure, when the A. T. A. study, and all the experience of traction companies using token fares, points to the fact that probably 50 per cent of the people would be paying 10 cents as contrasted with the 8-cent in effect on September 15, 1942.

Now, the suggestion is also made by Mr. Finerty that we were given a full hearing, because the character of the evidence that we offered really was irrelevant; and that the

Exhibit B, which was attached to our complaint, dealt with the earnings of the Railroad as a whole.

Well, the fact is, as the transcript shows, at page 2446a and 2446b,—as soon as the Commission announced that they were going to hold a new hearing, I sent one of our experts, Mr. Kosh, down to the offices of the Railroad, asked for a breakdown of the company's income and expenses to its railroad operations and to its overall operations. All [fol. 410] that, the company refused to produce. Then, of course, the one thing that was available was this report of seven months operations, which had been filed with the Commission. It wasn't in the record, and it wasn't proper for the Commission under the decisions to take notice of it, unless it had been incorporated in the record.

When Mr. Koch, K-o-c-h, the examiner, stated he wouldn't even allow that to be marked for identification, because, as the record shows, he said it was irrelevant, obviously, when we were precluded from cross examining the witnesses of the company as to the breakdown of the earnings from their railroad operations exclusively, obviously, we couldn't have any exhibits dealing with their railroad operations as distinguished from their overall operations, and as the record shows, Mr. Finerty expressly admitted, he says, that he refused to make that data that we asked for, that Mr. Kosh went down and asked for, at our request, he specifically refused to make that available.

Now, we think, again, that it is clear——

Judge McLaughlin: There is a question, Mr. Booth, if you are finishing up.

Mr. Booth: Pardon me.

Judge Fake: The rehearing at which you argue the evi- [fol. 411] dence you offered was not admitted, was the rehearing which led to the order of November 2nd?

Mr. Booth: Correct.

Judge Fake: And that rehearing was opened up for a very limited purpose, according to the order itself, was it?

Mr. Booth: Correct.

Judge Fake: Did the testimony that you attempted there to produce exceed the limitations of the order the Commission had fixed, or did they rule on that point?

Mr. Booth: Examiner Koch said at the opening of the hearing that the Commission's order of September 18th, reopening this case, after this injunction suit had been

instituted by the company, was limited to the question of the token fare problem and the feasibility. I took——

Judge Fake: The evidence then that you undertook to introduce transcended that limitation, did it, or did it not?

Mr. Booth: We will have to concede that it transcended the limitation which the examiner said was imposed by the Commission. We will have to admit that.

Judge Fake: Now, here is a point that has arisen in my mind during this argument: Isn't the Commission the sole judge as to when it feels it has sufficient testimony [fol. 412] before it, to discontinue further hearings? And then let's assume that they discontinue and you are aggrieved. Aren't you then in a position where you may further pursue your administrative remedy by asking for a complete rehearing on the entire record? And I think your answer to that would be yes.

Mr. Booth: I think that that is—that the effect of what we asked for in our October 14th motion which——

Judge Fake: Now, the difficulty with that is, I gather from what I have heard here, that a letter was written which did not conform with the rules of the Commission, either as to form or substance, and therefore the Commission has disregarded it. Is that correct?

Mr. Booth: Well, that refers merely to the letter of Jersey City supporting this formal motion and document which we filed with the Commission on October 14th.

Judge Fake: Yes; you say that refers merely to the letter of Jersey City.

Mr. Booth: That's right.

Judge Fake: Now, did you file——

Mr. Booth: Oh, yes.

Judge Fake: —any formal petition for rehearing on the entire case?

[fol. 413] Mr. Booth: I think that's what we did, and I think——

Judge Fake: Now, then, did you do it within time?

Mr. Booth: Oh, yes. We did it on October 14th, at the same time that we filed our brief with the Commission, after the close of the hearings on September 29th.

Judge Fake: And it was your contention there that the entire record should be re-examined, is that correct?

Mr. Booth: We made a specific request——

Judge Fake: Now, they ruled against you on that?

Mr. Booth: That's right.

Judge Fake: Well, how could that issue get to this Court? Why wasn't that entirely within the discretionary power of the Commission?

Mr. Booth: If this Court is of the opinion that a railroad transportation company may increase its rates, even with an order of the Interstate Commerce Commission, without showing—increase its rates over and above the rates in effect on September 15, 1942, without any effect or consideration to the need for keeping down the cost of living, if this Court is of the opinion that the courts have no power to pass upon the question whether a fair hearing has been granted, notwithstanding the long line of decisions and the elemental principle that that is a judicial question and not [fol. 414] a question for the Commission, and that in all the cases, practically all the cases, you will find that the Commissions have leaned over backwards, and the courts have said that a full and fair——

Judge Fake: Are you here today on any exception to that particular petition that we are talking about?

Mr. Booth: Oh, yes. Our complaint, intervening petition, says specifically——

Judge Fake: I thought you were here on an order of June 8th, and another order of November 2nd.

Mr. Booth: Correct.

Judge Fake: Now you have one there that seems to have to do with another date, haven't you?

Mr. Booth: Oh, no. The order of November 2nd, of the Commission——

Judge Fake: It is based on that petition?

Mr. Booth: That's right. That denies that, and in our complaint, intervening petition here, we have said that a full and fair hearing was denied the Director, because of the refusal of the Commission, the examiner, to allow us to present the evidence on September 28th, as well as the denial——

Judge Fake: Now, did you introduce any evidence bearing on inflation?

[fol. 415] Mr. Booth: Did we present any evidence on inflation? I just don't know what that means. I don't agree with—that is, I don't agree with counsel for the Railroad, his position as to what evidence is——

Judge Fake: His position, apparently, is, and that's why I ask you, that certainly you have no right to appear ex-

cept on that one issue, and that's the only issue with which you are concerned. You are concerned only with the question of inflation.

Mr. Booth: We are concerned with——

Judge Fake: That's his position.

Mr. Booth: Yes.

Judge Fake: I don't know that it is sound but——

Mr. Booth: Well, we don't agree with that. I don't know what he means by what is inflation; and I don't know that we are restricted merely to a showing, as he suggests, that once the Commission has authorized an increase, to show that the increase is contrary to the Act of October 2nd. We were trying to demonstrate that the increase in the fares was not necessary as far as this company was concerned, because of the improvement in its operations, as a result of the war, and the restrictions imposed——

Judge Fake: Did they already have any testimony on that subject before them?

[fol. 416] Mr. Booth: They had practically nothing, because the record had been closed in September of 1942, and as we have contended, the record had become stale, and the order of the Commission had become illegal and invalid, and we were trying to bring this record, both Jersey City and ourselves, down to date; and we, in our motion—it has been suggested that we didn't ask for the production or we didn't ask to lay down certain specific evidence. The Commission in its order said very clearly that it didn't think this evidence would make any difference in its conclusion; but it didn't know what evidence we were going to offer, and it didn't criticise our offer of evidence because we weren't specific.

Judge Fake: Well, then, according to that, you didn't have anything before them.

Mr. Booth: Pardon me, ——?

(Comment by Judge Fake was repeated by the reporter.)

Mr. Booth: Well, we did have something before them, because we had the exceptions from the rulings of the examiner, prohibiting us from presenting the evidence. In our October 14th motion we took exceptions to the rulings of the examiner which prohibited us from cross examining the witnesses of the company and prohibited our witnesses [fol. 417] from——

Judge Fake: Have you any cases to the effect that where you are precluded before this Commission from cross examining witnesses, that that amounts to arbitrary and capricious conduct on the part of the Commission?

Mr. Booth: I think that the cases that we have cited——

Judge Fake: Oh, you have them in your brief?

Mr. Booth: In our brief.

Judge Fake: All right. Don't waste any time then. We will read them.

Mr. Booth: — amply support that proposition, as a general proposition. And in closing, we again suggest that I think a full and complete case has been made out by Jersey City and by the Director, entitling us to a permanent injunction in this case.

Judge McLaughlin: Mr. Finerty, we said we would give you a few minutes to cover the points raised on the replies, if necessary.

Mr. Finerty: Thank you very much.

In connection with Judge Fake's query to Mr. Booth, as to the power of the Commission to control the matter of reopening of a record before it, what you stated, Judge Fake, is substantially the decision of the Supreme Court of the United States, in Illinois Commerce *Commerce* Com-[fol. 418] mission v. U. S., 292 U. S. 474, cited at pages 42 and 43—42 to 44—of our brief and there discussed.

Now, I dislike very much to accuse my opponents of misrepresentation, but I can't consider it anything less when Mr. Eisen repeats here what he has repeated, in spite of admonitions to the contrary, throughout this proceeding, that the factual situation upon which the Commission acted in entering its order of June 8, 1943, was exactly the same as that on which its order of July 11, 1938 was entered.

Aside from the Commission's reports, I took exception to that reiteration of that statement as long ago as the reply filed by the Hudson & Manhattan to Mr. Eisen's exceptions to Examiner Trezise's report, reply of March 18, 1943, which is filed here as Defendant's Exhibit 10, and I desire very particularly to call the Court's attention to pages 23 to 30 of that brief, setting out in detail the change in the factual situation, and the record citations supporting it.

Judge Meaney: What exhibit is that, Mr. Finerty?

Mr. Finerty: That's Defendant's Exhibit 10, Judge Meaney.

Judge Meaney: And pages 23 —— ?

Mr. Finerty: Pages 23 to 30.

[fol. 419] I also desire to call your attention to the amended bill, pages 41 to 42, setting out the Commission's findings and order of June 8, 1943; and there they set out their major findings, being substantially along the lines indicated in my exceptions. Unfortunately, they didn't go all the way with me, and they gave us a 9-cent fare instead of a 10-cent fare. But as far as the changes in conditions are concerned, they are there set out. And I call your particular attention to the fact that Mr. Eisen again is absolutely unwarranted in this record by his repeated statement before this Court, he made it on the interlocutory injunction, that the Commission's order approving the 9-cent fare, of June 8, 1943, was based on ex parte 148. Ex parte 148 was only incidentally mentioned in connection with that order as a matter that we might have taken advantage of but didn't. It is true that later, in the order of November 2nd and the order of August 3, 1943, the Commission found on the basis of their finding in ex parte 148, that the maximum reasonable fare on the uptown line of defendant was no longer 10 cents but 11 cents, and said we might have taken advantage of that but hadn't; instead of which, we were reducing that fare to 11 tokens for a dollar.

Now——

[fol. 420] Judge Fake: What about the proposition of not being able to get contribution until this issue here is settled?

Mr. Finerty: From the Pennsylvania Railroad? I am coming to that.

We took the position, and one of the grounds for reopening on which we applied in June, 1942 for reopening of the Commission's order of July 11, 1938, was that so long as that order stood, prescribing an 8-cent fare as a maximum fare on the downtown line, we could not expect to coax the Pennsylvania Railroad, at any rate, into an increase in divisions. Our divisions on the uptown line are 7.56. The five-cent division, so-called, which Mr. Eisen, with, I am afraid, characteristic—well, I won't characterize it—is a minor arrangement on a very minor part of the traffic; I think about five per cent of the traffic is affected by an interchange through Exchange Place. That involves, in

addition to the five-cent allowance made us on that traffic, the cession of certain rights of way, submarine and sub——

Judge Meaney: ——terrain.

Mr. Finerty: ——terrain rights—subterranean rights. It has no relevance to this case at all, as far as the major division is concerned, that is 7.56 cents, 7.64 cents, on the [fol. 421] downtown line. Now, with an 8-cent fare as a local fare, where you perform two terminal services, and on a joint fare you only perform one, the Pennsylvania Railroad has an excellent argument, I would have to admit even to them, that with a local fare of 8 cents, a division of 7.64 is not an unreasonably low division. We said that to the Commission. The Commission has recognized that, recites that in its review of the reasons for the order of June 8, 1943; and the Commission has interpreted what it meant by that suggestion that we look——

Judge Fake: May I interrupt you?

Mr. Finerty: Yes.

Judge Fake: Really, what right have we got to go into it anyway, here?

Mr. Finerty: Well, I wouldn't put it quite as bluntly as that, but that is really the case, Judge Fake. It is a matter wholly within the Commission's province. The Commission has said that we should conform to their directives, so-called; and if it is satisfactory to the Commission, if there is evidence to support it, I don't think it is the province of this Court to review that question. It is a red herring that has been in this case from the start, and I would be the first to admit that it has caused us a lot of trouble. But as [fol. 422] far as a ground for an injunction is concerned, it is simply absurd.

Now, I meant what I said at the start, and I mean what I say at the finish: that aside from that perfunctory reference that Mr. Eisen made to the allegations of the bill, that the orders of the Commission were without evidence to support them—not a word he said supported that allegation. On the contrary, the Commission's own orders bear on their face evidence to support them, and we have undertaken in our brief to set out, as I say, the evidence supporting those findings and orders, and there is evidence supporting them; and there being evidence to support them, in my opinion, and within the decision of this Court, in the former Hudson & Manhattan case, this injunction should be denied.

Judge McLaughlin: Is that all, Mr. Finerty?

Mr. Finerty: Thank you very much.

Judge McLaughlin: You people don't forget that those briefs, both Mr. Booth's and yours, Mr. Hershenstein, are to be in the hands of the Court by next Monday.

Mr. Hershenstein: Yes, sir.

Mr. Booth: I assume that applies also to the Railroad and the I.C.C.

Mr. Finerty: Of course.

[fol. 423] Mr. Booth: If they desire to file briefs. They haven't seen our briefs yet.

Judge McLaughlin: Well, we may as well clear it. Do you want to file some additional briefs?

Mr. Finerty: I would like the privilege.

Judge McLaughlin: All right. And will you see that Mr. Reidy has word on that?

Mr. Mulcahy: Yes, your Honor.

Mr. Finerty: Might I correct just one thing in the record?

Judge McLaughlin: Yes.

Mr. Finerty: The statement that in ex parte 148 the Commission set aside the 10 percent increase except on long hauls is not correct. It set it aside only on commutation fares, and having set it aside on commutation fares, it still held it a the measure of our fare on the uptown line, and said that under ex parte 148, that single trip fare still being in existence, our fare on the uptown line might well be 11 cents. That was the only use made of ex parte 148.

Judge McLaughlin: Anything else?

Mr. Hershenstein: Where shall we mail our briefs? To the Newark office?

Judge McLaughlin: Wait a minute, now.

Mr. Hershenstein: Wherever it is more convenient for [fol. 424] you.

Judge McLaughlin: Mail it to Newark. I will be sitting in Philadelphia, but I will get it down from here.

Mr. Hershenstein: Very good, sir.

Judge McLaughlin: All right. Is that everything?

Mr. Finerty: Yes. Thank you very much.

Mr. Booth: Thank you.

Judge McLaughlin: All right. Court is adjourned.

[fol. 425] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CITY OF JERSEY CITY, Plaintiff, and FRED M. VINSON, Economic Stabilization Director, by Chester Bowles, Price Administrator, Intervener,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and Hudson & Manhattan Railroad Company, Defendants

OPINION—Filed January 12, 1944

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges,

McLAUGHLIN, Circuit Judge:

In the case the plaintiff, City of Jersey City, New Jersey, and the intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, prayed this Court to set aside, annul and perpetually enjoin, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.) the rate order issued by Interstate Commerce Commission on June 8, 1943 in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649), and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —). The order of June 8, 1943 authorized the said carrier to increase the fare on its downtown line (extending from Jersey City and Hoboken, New Jersey to Hudson Terminal [fol. 426] in downtown New York City, New York) from eight to nine cents, for the duration of the war and six months thereafter, or until otherwise ordered by the Commission. The supplemental order of November 2, 1943 authorized the carrier, in lieu of the nine cent downtown fare, to charge a cash fare of ten cents or a token fare on a basis of eleven tokens for one dollar, upon establishing an identical fare on the carrier's uptown line; the present uptown fare being ten cents, without a token fare. On November 26, 1943, after a hearing, this Court issued an interlocutory injunction suspending the enforcement of said rate orders pending final hearing on the merits.

Full and Fair Hearing

At the outset we are confronted with the vitally important question of whether the plaintiff and intervener were given a full and fair hearing by the Commission. From the facts, the petition by the carrier to the Commission, was one for additional revenue. The orders of the Commission were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing. The United States Supreme Court in Interstate Commerce Commission vs. Louisville and Nashville Railroad Co., 227 U. S. 88; 33 Sup. Ct. Reports 185, stresses this. The Supreme Court said in that case at page 93:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. v. Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act [fol. 427] upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 226 U. S. 14."

In the report and order of the Interstate Commerce Commission of June 8, 1943 appears the following:

> "Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about

30 percent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

The same report and order also stated:

"It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

Following that order of June 8, 1943, the carrier filed a supplemental petition alleging inability to collect the allowed nine cent fare and asking for a token fare which amounted to nine and one-tenth cents and in the alternative, a ten cent cash fare. The intervener filed an answer to that supplemental petition asking that the Commission

" 'in view of petitioner's tremendously improved current earnings * *.' " to '*reconsider its previous modification of its original order and return petitioner's downtown fares to the original level of 8¢. This will serve the national program to keep down the cost of living.*' "

[fol. 428] Then followed the Interstate Commerce Commission order of August 3, 1943 which allowed the prayer of the supplemental petition of the carrier. Thereafter, the municipal plaintiff filed its bill of complaint in this Court with Fred M. Vinson, Economic Stabilization Director, intervening as a co-plaintiff. After that, the Interstate Commerce Commission, of its own motion, held a supplemental hearing which it confined solely to the practicability of the nine cent fare. At that hearing both the intervener plaintiff and the municipal plaintiff, attempted to present evidence relating to the 1943 earnings of the carrier for the purpose of showing that under such earnings no increase in fare whatsoever was justified. This offer was rejected by the examiner for the Commission. Both plaintiffs objected to such limitation of the scope of the hearing. In addition, cross-examination of a carrier witness by the plaintiffs as to a $240,000. charge for expenses alleged by the carrier and called War Damage Reserve, was refused

by the examiner although it was strenuously suggested that such item was no longer acceptable, at least for any such amount. Thereafter the intervener plaintiff petitioned the Commission to modify its order of September 18, 1943 which limited the scope of the further hearing and to permit testimony of the earnings of the carrier since the original closing of the record, alleging that the record as it then stood was stale and did not reflect the true picture. The municipal plaintiff informally joined in that application by letter. The Commission, in its opinion of November 3, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel [fol. 429] warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."

Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. It actually considered the proposed evidence and decided that, despite it, its decision should stand. The municipal plaintiff and the intervener, by that evidence, offered to show that the carrier's rise in business and net earnings had completely removed any reason for an increase over the eight cent fare. In refusing to consider such testimony which, under the terms of its tender went to the heart of the controversy, in our judgment the Commission did act arbitrarily and contrary to the mandate of its statute. As Mr. Chief Justice Hughes said in Atchison, Topeka & Santa Fe Railway Co. vs. United States, 284 U. S. 248, at page 262:

> "We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

In that case, which seems very much in point here, the Court also said, speaking as to the function of the Interstate Commerce Commission in such circumstances, page 262:

> "In the discharge of its duty, a fair hearing is a fundamental requirement. Interstate Commerce Comm.

vs. Louisville & Nashville R. Co., 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied."

We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above. Starting with the intervener's answer [fol. 430] on July 19, 1943 to the carrier's supplemental petition, these plaintiffs have ever since that time, been specifically requesting the Commission to reconsider its increase in fare order, in view of the carrier's tremendously improved current earnings. The intervener did it formally in its answer above referred to. Both plaintiffs strenuously urged it at the supplemental hearing and thereafter by the petition above referred to in which the Commission was requested to broaden the scope of its supplemental hearing so as to include evidence as to the carrier's 1943 earnings. The Commission order of November 2, 1943 definitely decided that such new evidence would not be admitted. That order permitted the carrier to file and make effective the new tariffs on fifteen days notice. The Commission took the position that it was without power to further suspend the tariffs. In reality, therefore, both plaintiffs had exhausted their remedy before the Commission. In connection with this, the language of the order of June 8th above quoted, permitted any party of the proceeding to bring any changed conditions resulting in a different revenue situation to the attention of the Commission for a further hearing.

In passing, we do not see either under the I. C. C. statute or the relevant decisions that any request for rehearing is actually required prior to suit in this Court. In Baltimore & Ohio Railroad Co. vs. U. S., 298 U. S. 347, the United States Supreme Court held at page 371:

"No Act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within

which the carrier may sue to enjoin enforcement of an order of the commission prescribing rates or divisions."

By the language of its order of November 2, 1943, the Commission indicates plainly that it had actually passed [fol. 431] upon and rejected the offer of the plaintiffs to present the 1943 earnings of the carrier in an effort to show that any increase in fare under the true present facts was not justified. In such situation the remedy of the plaintiffs before the Commission was exhausted; with the plaintiffs, if they wished to pursue the matter further, having no recourse but to come to this Court under the statute.

Economic Stabilization

We do not see that this phase of the case can be lightly brushed aside. Under present conditions, we doubt if its importance can be readily overestimated. Were these orders issued in violation of the national emergency policy of economic stabilization? The Commission said in its order of June 8, 1943:

> "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

By that language, the Commission undoubtedly realized that the problem of inflation of the cost of living was involved in this particular rate increase. The Commission, without even considering the substantial proportionate increase as to the total fare, which amounts to approximately thirteen per cent, but simply having in mind the small amount in money the increase meant to each passenger taken alone, dismissed this phase of the matter as negligible. We do not see that there was ever any claim by the Director of Economic Stabilization that the raise in rates here by and of itself, would result directly in inflation. The gauge urged on behalf of Director Vinson was that set out in U. S. Gypsum Co. v. Brown, 137 F. 2d 360, where the United States Emergency Court of Appeals,

[fol. 432] speaking through Chief Judge Maris said at page 364:

> "'The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral. See Lincoln Sav. Bank v. Brown, 137 F. 2d 228.'"

In the case of Philadelphia Coke Company vs. Chester Bowles, U. S. Emergency Court of Appeals, December 15, 1943, not yet officially reported, the Court said:

> "In a complicated economy such as ours the phenomena of price increases are the result of a complex of causes, the interaction of many economic forces. When inflationary pressure is one of the major forces operating in the economy it is wholly unrealistic to consider the price of a single commodity as in an economic vacuum and say that no threat of an inflationary increase can be discovered. Each commodity price must then be considered in the light of the fact that it forms an integral part of the whole price structure."

For the Interstate Commerce Commission to permit the Director to intervene is not enough under the relevant statutes, orders and directives with reference to price stabilization. It is, of course, true that the Price Administrator does not have the authority to regulate carrier rates nor is such authority claimed here by the intervener but it is apparent that the executive orders issued with reference to stabilization do furnish a basic guide for all government agencies concerned, including the Interstate Commerce Commission. The President's Executive Order No. 9250, issued October 3, 1942, reads in part:

> "The guidance policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942;"

[fol. 433] The President's Order of April 8, 1943, No. 9328 reads:

> "The attention of all agencies of the Federal Government, and of all State and municipal authorities, con-

cerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.''.

It does seem from these that the Commission here is under a distinct duty in this particular case to give full effect to war time conditions and the stabilization legislation. It seems further, that in characterizing the allowed increase to this carrier as negligible and not directly causing inflation, that the Commission has failed to consider the dangerous, cumulative effect of the present allowed increase in connection with all the other cumulative sources of inflation, perhaps small in themselves, but tending collectively to defeat the vital policy of controlling inflation as indicated in the above referred to Executive Orders of the President and the Act of October 2, 1942.

In view of the conclusions we have reached, there is no necessity for discussing the other points raised by the plaintiff and intervener. A permanent injunction will issue against the Interstate Commerce Commission as to its orders of June 8, 1943 and November 2, 1943 with respect to the increase in fare on the carrier's downtown line as set out in said orders.

[fol. 434] DISSENTING OPINION

FAKE, District Judge, Dissenting:

This is not the first time the passenger rates of the Hudson & Manhattan Railroad Company have been considered by this court. The company filed a local passenger tariff to become effective September 1, 1937, providing for a ten cent fare on its downtown line. This led to protests and extended hearings resulting in the establishment of a rate of eight cents by the Commission, two members thereof dissenting because they believed the ten cent fare to be justified. Resort was then had to this court resulting in the sustaining of the eight cent rate so established. The opinion of this court on the subject is found in Hudson & Manhattan Railroad Company vs. U. S., 33 Fed. Supp. 495,

affirmed, 313 U. S. 98. Therefore, the issues now before us do not come without some knowledge of the prior record.

I agree with the prevailing opinion that the dispositive issues here arise on the question of arbitrary action by the Commission in refusing to receive and consider evidence offered by the Price Administrator and the City of Jersey City on September 28, 1943. An examination of the proffered evidence discloses on its face that it transcends the limitations placed on the receipt of evidence by the Commission in its reopening order of September 18, 1943.

In this connection it is found on looking back over the record that an eight cent fare as established in 1938 has continued in actual operation down to the present time. On June 27, 1942, the Railroad Company petitioned the Commission for a further hearing and again sought authority to charge ten cents on its downtown line. Replies were filed to this petition by the City of Jersey City and divers [fol. 435] others, and on July 13, 1942, the Commission issued an order opening the proceedings. Commencing on September 9, 1942, and running through September 19, 1942, hearings were held bearing upon the issues involved on the petition and replies. On September 17, 1942, the Price Administrator entered an appearance on the record, and reserved the right to be heard and to file a brief. His representative was then asked whether he desired to introduce any evidence and his answer was "Not at this time". On November 13, 1942, the Commission issued an order permitting the Price Administrator to intervene. Sometime during January or February, 1943, a proposed report by the Commission was issued.

On March 8, 1943, exceptions to the proposed report were filed by the Price Administrator and also by the City of Jersey City and six other municipalities and divers bus lines. On March 18, 1943, the Railroad Company filed a reply to the exceptions. On April 20, 1943, a stipulation to supplement and bring the record up to date was filed showing the total patronage and revenue of the Railroad Company for the months of January and February, 1943, and on that date oral argument covering all the issues then pending took place before the Commission. On June 8, 1943, the Commission filed a report and order establishing a nine cent fare on the downtown line, three of the Commissioners however maintaining the view that a flat fare of ten cents was reasonable.

On July 8, 1943, the Railroad Company filed a petition for reconsideration and modification of the Commission's order of June 8, 1943, on the ground that mechanical difficulties prevented its operation. On July 14, 1943, the City of Jersey City, et als., filed a reply to the Railroad Company's petition. On July 19, 1943, the Price Administrator [fol. 436] filed a reply.

The petition of the Railroad Company last above mentioned and the replies thereto raised certain issues bearing on difficulties confronting the Railroad Company in the matter of the collection of the nine cent fare, and the Commission found that by reason of the peculiar construction and operation of the mechanical fare-collecting devices, nine cents, however divided, could not be received and properly counted in these devices; that other means of collecting that sum were impractical because in each instance they would result in unreasonable expense to the Railroad Company and involve serious delays in the discharge of its passengers. The evidence shows clearly that speedy discharge of passengers is of prime importance because the schedules of the connecting railroads are arranged to prevent traffic congestion. For these, and other reasons, the Commission entered its order of August 3, 1943, modifying its order of June 8, 1943, permitting a fare of one dime or the use of eleven tokens at $1.00 for eleven rides on both the uptown and downtown lines. This afforded the uptown passengers a fare of 9-1/11¢ where under the prior order of June 8, 1943, they were to pay ten cents and would cause the downtown passengers to pay 9-1/11¢ where under the prior order they were to pay nine cents. In this connection it seems to me the Commission functioned fully within its lawful sphere of action, and down to this point I am not able to find even the slightest question of arbitrary action. There was ample evidence before the Commission to bring their action within the rule laid down by the decision of the United States Supreme Court above cited, and in this connection it was not then and is not now within the province of this court to weigh the testimony and form a conclusion [fol. 437] in conflict with the Commission's findings of fact. The Commission must be sustained whenever it appears that "there was evidence to support the Commission's findings". Such were the words of the Supreme Court.

On September 13, 1943, the City of Jersey City filed its complaint in this court and the Price Administrator was subsequently permitted to intervene in this action.

On September 18, 1943, the Commission entered its order reopening the proceedings, limiting the same as follows: "for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943 * * * that at such further hearing any party hereto shall have the right to cross-examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission." All of which clearly discloses the intent of the Commission to consider all issues closed save only the one specifically referred to.

Thereafter on September 28, 1943, and of course after the institution of the suit here, the representatives of the City of Jersey City and of the Price Administrator attempted to introduce evidence bearing upon the earnings of the carrier for the first six months of the year 1943, for the purpose of showing that there was no justification for the increased fare allowed either under the order of June 8, 1943, or the order of August 3, 1943, and that the action of the Commission was inflationary. Also it was sought to cross-examine witnesses who had appeared at prior hearings and testified in relation to a $240,000 charge made by [fol. 438] the Railroad Company for war damage reserve. It is my view that when by stipulation as hereinbefore appears, evidence was introduced bearing upon the earnings for the months of January and February, 1943, this made the evidence reasonably current and timely. However, here the Commission functioned with open eyes within their discretionary powers and this court cannot usurp their functions on the question of reasonable time as applied to the timeliness of the record. Rate making is a highly specialized art. The Commissioners had evidence on the subject before them and listened to arguments on that point and we should not substitute our judgment for their's. Prior to June 8, 1943, the Commission had full opportunity for the introduction of evidence and arguments were heard bearing upon the $240,000 item. As to the proffered new

evidence, the Commission said in its report of November 2, 1943, "* * * we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

Of course the flow of economic change never stops—always and forever the comings and goings and doings of man have their effect in preventing a static period at which time the Commission might stop and make a decision. Always the point of termination must be fixed in the midst of fluctuations in the economic factors involved. It is my view that this court should not enter the province of the Commission in considering the subject of inflation. They were charged with the duty of passing on it by reason of the executive order on that subject and dealing as they do from day to day with economic factors, they constantly are kept advised in that field, and I believe their action here resulted from close attention to all the factors involved [fol. 439] including inflation.

A careful study of the record convinces me that there was ample evidence to sustain the validity of each of the rulings made by the Commission herein and I am therefore unable to concur in the prevailing opinion.

[fol. 440] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed January 12, 1944

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges.

FINDINGS OF FACT

1. This action was brought by the City of Jersey City, New Jersey and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, against the United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, for the purpose of setting aside, annulling and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943 in a matter

titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (225 I. C. C. 649) and a supplemental order issued [fol. 441] therein on November 2, 1943 (256 I. C. C. ——).

2. Plaintiff is a municipal corporation in the County of Hudson, State of New Jersey and is a body politic.

3. The intervener plaintiff is the agency designated by the President to receive notice of any increase in the rates or charges of common carriers or other public utilities, pursuant to the Emergency Price Control Act of January 30, 1942, as amended October 2, 1942 (Public Laws 421 and 729, 77th Congress, 2nd Session); with authority to intervene and participate in proceedings before Federal, State and municipal authorities in connection with proposed increases in such rates and charges.

4. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

5. The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

6. The defendant, Hudson & Manhattan Railroad Company, is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey.

7. The matters covered by the aforesaid orders of the Commission relate to transportation and arose in part in the District of New Jersey. This Court has jurisdiction.

[fol. 442] 8. Defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, and is subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I. It transports no baggage, freight or express matters.

9. The defendant, Hudson & Manhattan Railroad's property consists of an underground rapid transit passenger

railway, operated exclusively by electric power of the three rail type, and furnishing transportation facilities between points in Jersey City and Hoboken, New Jersey and downtown and uptown New York City. On its downtown line, this defendant's trains operate between (a) the Jersey City, New Jersey stations of Exchange Place, Grove and Henderson Streets and Journal Square, and said defendant's downtown terminal at Hudson Terminal, New York City and (b) between the Jersey City, New Jersey stations at Exchange Place and Erie Station and Hoboken, New Jersey and the said downtown terminal at Hudson Terminal. On its uptown line the trains operate (a) between the Hoboken, New Jersey station and the uptown New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the Jersey City, New Jersey stations of Journal Square, Grove and Henderson Streets and Erie Station and the said uptown New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

10. The defendant railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between its downtown terminal at Hudson Terminal, New York and the station of the Pennsylvania [fol. 443] Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the defendant railroad between its downtown terminal, Hudson Terminal at New York City and the Journal Square Station, Jersey City and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

11. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff, Jersey City, and others in New Jersey, the effectiveness of the aforesaid

tariff was suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

12. After due hearing the Commission on July 11, 1938, found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741, found:

[fol. 444] (1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.

(2) "If the respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

13. Following the promulgation of the report and order of July 11, 1938, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, Hudson & M. R. Co. vs. U. S., 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District Court for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court for the District of New Jersey, Hudson & M. R. C. v. United States, 33 Fed. Supp. 495, which was affirmed by the Supreme Court, Hudson & Manhattan R. Co. v. U. S., 313 U. S. 98.

14. Upon petition of the defendant railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten cent fare on its downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. On November 9, 1942, notice was served upon the plaintiff inter- [fol. 445] vener of such proceeding and his timely intervention in such proceeding was consented to. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

15. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in Increased Railway Rates, Fares and Charges, 1942, supra, the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight-cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions on the interline traffic."

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford

stronger support, differences in transportation services considered, for either an eight-cent or a nine-cent fare than for a ten-cent fare on the downtown line of respondent."

[fol. 446] 16. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine-cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare-collection boxes. In connection therewith, the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

17. The plaintiff, Jersey City, on July 14, 1943, answered the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters therein alleged and thereby afford the plaintiff its right of cross examination. The plaintiff intervener filed his answer to the railroad's supplemental petition on July 19, 1943. He opposed the proposed modification in rates on the ground that such modification would result in additional inflation, and he requested that the Commission reconsider its June 8th order and restore the downtown fare [fol. 447] to the eight-cent level, stating:

"In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return petitioner's downtown fares to the

original level of 8 cents. This will serve the national program to keep down the cost of living."

18. On August 3, 1943, upon the facts as aforesaid, without according the plaintiffs further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

19. In so providing for increased fares on the down town line whereby the regular patron or so-called commutation passenger would be required to pay nine and one-eleventh cents per ride, and the occasional rider ten cents per ride in lieu of the nine-cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial [fol. 448] portion thereof, for the reasons herein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

In the original report and order of the Commission made July 11, 1938, 227 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight-cent downtown

fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, Hudson & M. R. Co. v. U. S., supra, and affirmed by the Supreme Court of the United States, Hudson & Manhattan R. Co. v. U. S., supra. A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649 and again in its report and order of August 3, 1943.

20. On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, having for its purpose the enjoining of the report and order of August 3, 1943. Application was made, upon filing said bill, for a temporary restraint against putting into effect said order and a statutory court was duly established to hear said application.

21. On its own motion, by order dated September 18, 1943, and prior to hearing of the application for a temporary restraint, the Interstate Commerce Commission reopened the instant proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by [fol. 449] the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto * * * the right to cross examine adverse witnesses."

22. Both the plaintiff and the intervener plaintiff excepted to the restrictions and limitations imposed by the Commission's aforesaid order for supplemental hearing, insisting at the start of the hearing and repeatedly throughout the proceeding, that the hearing be broad enough to include evidence of the defendant railroad's revenues, expenses and earnings since the closing of the original hearing in the matter. Both plaintiffs excepted to the interpretation given by the trial examiner to the Commission's order of September 18th re-opening hearing in that he refused to receive any testimony with respect to the railroad's revenue except testimony confined strictly to the difference in revenue resulting from the authorized cash fare and the

combination cash and token fare. Both plaintiffs endeavored to submit proof that the railroad's patronage had been increased by amount in excess of thirty percent in 1943 over 1941 and that no additional revenue was necessary or could be properly allowed in excess of the existing eight cent local downtown fare. This proffer was in accord with the decision of the Commission of June 8, 1943 reading:

> "Under present fares (eight cents on the local downtown line and ten cents on the uptown line) it would be necessary for its annual traffic to increase by about thirty per cent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

That same order also stated:

> "It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respond-
> [fol. 450] ent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

23. At that hearing of September 18, 1943, both plaintiffs sought to introduce in evidence a "Condensed Income Statement" of the defendant railroad covering the months of July 1942 and July 1943 and the first seven months of 1942 and 1943 respectively. That exhibit was excluded from the record. It was contended it showed the repeatedly improving financial position of the railroad even after all of its alleged operating expenses and that at the existing eight cent fare the railroad is earning more than the Commission anticipated it would at the nine cent fare in its order of June 8, 1943. The contention was further made that the offered exhibit showed that an alleged expense of $20,000 a month of the carrier for self insurance cost was entirely unwarranted and should be eliminated and if it were, that the defendant railroad would earn at the existing eight cent fare far in excess of all interest charges, a condition not anticipated at the nine cent fare, by the Commission in said order.

24. Thereafter, on October 14, 1943, the intervener plaintiff filed with the Commission, a written motion for modification and amendment of its said order of September 18, 1943. In that motion, the municipal plaintiff joined by letter. The motion was based on the restrictive scope of the supplemental hearing of September 18, 1943 and requested the re-opening of the proceeding to permit the plaintiffs to introduce the evidence excluded by the examiner and such additional evidence as might be necessary in order to bring the record alleged to be obsolete and stale, down to date.

[fol. 451] 25. That motion was overruled by the Commission in its "Second Report on Further Hearing issued November 2, 1943, wherein the Commission granted the petition of the Railroad to substitute token and cash fares on its downtown and uptown lines in lieu of theretofore authorized cash fares.

26. The Commission in its opinion of November 2, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."

27. The order of the Commission of November 2, 1943 permitted the railroad to file and make effective the new tariffs on fifteen days notice.

28. With reference to the economic stabilization and inflation branch of this case, the Commission in its order of June 8, 1943, which increased the downtown fare cash from eight cents to nine cents said:

> "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

29. On November 18, 1943 an amended complaint was filed in this cause by the plaintiff, City of Jersey City, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervened as a plaintiff by petition. The above facts were referred to in the amended complaint and the intervener's petition. The [fol. 452] amended complaint of the plaintiff, City of Jersey City, prayed that upon final hearing of this cause that this Court order, adjudge and decree that the orders of the Commission dated June 8, 1943 and November 2, 1943, insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company, is, and at all times has been, beyond the lawful authority of said Commission, and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Prayer was also had for a temporary injunction and restraint enjoining the defendants from so much of said orders of June 8, 1943 and November 2, 1943 as permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener plaintiff prayed that pending the final hearing of this cause, the Court issue an interlocutory and permanent injunction and restraint enjoining the defendants from so much of said orders of June 8 and November 2, 1943, as permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener also prayed that upon final hearing this Court adjudge, order and decree that said orders of June 8 and November 2, 1943, insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company, are, and have at all times been, in violation of the Stabilization Act of October 2, 1943 enacted by the Congress; and said orders are [fol. 453] and have at all times been, beyond the lawful authority of said Commission and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

30. The defendant, United States of America, filed a neutral answer. The defendants, Interstate Commerce Commission, and Hudson & Manhattan Railroad Company, filed their respective answers to the amended complaints and the intervener's petition. Said answers in substance admitted the making of the orders of the Commission of June 8, 1943 and November 2, 1943; denied that the plaintiffs were not allowed a full and fair hearing, denied that said orders failed to give effect to the stabilization program and the efforts of the national government to cut down the cost of living and alleged that said orders were made after full hearing and consideration of proofs and arguments of all parties and that they are fully supported by the evidence before the Commission and by the Commission's findings based on such evidence. In addition, the defendant railroad in its answer and the defendant, Interstate Commerce Commission in its amended answer, alleged that the relief sought by the plaintiffs is premature, saying that neither of the plaintiffs have exhausted the administrative remedies provided in cases of this kind and further, that both the plaintiffs are estopped from now questioning the reasonableness of the nine cent fare found reasonable by the Commission's report of June 8, 1943. They allege that the estoppel arises because neither of the plaintiffs has ever filed a petition with the Commission asking reargument or reconsideration of the order of June 8, 1943 although "Rule 101 of the General Rules and Practice of the Commission specifically provides for such petitions in connection with any decision or order of the Commission."

[fol. 454] 31. Following hearing on the application for an interlocutory injunction on November 26, 1943, this Court issued its findings and order restraining and enjoining the defendants, pending final hearing in this proceeding, from putting into effect the report and orders of the Interstate Commerce Commission of June 8, 1943 and of November 2, 1943 insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company.

32. Final hearing was had in this cause on December 14, 1943.

[fol. 455] CONCLUSIONS OF LAW

1. Both the plaintiff, Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, are proper parties to bring and maintain this proceeding as plaintiffs herein.

2. The petition by the defendant carrier, Hudson & Manhattan Railroad Company, to the Interstate Commerce Commission of July 27, 1942 asking for a ten cent fare on its downtown line, was one for additional revenue and the orders of the Commission of June 8, 1943 and November 2, 1943 were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing.

3. Both the plaintiff, City of Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, properly appeared as protesting parties before the Interstate Commerce Commission and were and are entitled to a full and fair hearing by that Commission.

4. Both the plaintiff and the plaintiff intervener, were denied a full and fair hearing in that they were deprived of the right to cross-examine witnesses and to present testimony on matters which have a substantial bearing upon the right of the Hudson & Manhattan Railroad Company to fares higher than fares charged on September 15, 1942.

5. That the Commission's said orders of June 8, 1943 and November 2, 1943 authorizing increases in fares failed to give effect to the economic stabilization program and efforts of the national government to keep down the cost [fol. 456] of living, particularly in that the Commission erroneously assumed that said increases would not have any effect on the program to keep down the cost of living.

6. That both the plaintiff and the intervener plaintiff exhausted their administrative remedies before instituting this proceeding.

7. That the plaintiff, City of Jersey City, and the intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, are entitled to the setting aside and annulling of said orders of

June 8, 1943 and November 2, 1943 and to a perpetual injunction against their enforcement insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company.

8. That the plaintiff, City of Jersey City, and intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, are not estopped from questioning the validity of the nine cent fare on the downtown line of the defendant, Hudson & Manhattan Railroad as authorized in the Commission's order of June 8, 1943 or the further increases in said downtown fare authorized by the Commission's order of November 2, 1943.

A decree shall be entered herein accordingly.

—— ——, United States Circuit Judge; —— ——, United States District Judge.

Newark, New Jersey, January 12, 1944.

[fol. 457] IN THE UNITED STATES DISTRICT COURT

CITY OF JERSEY CITY, Plaintiff,

and

FRED M. VINSON, Economic Stabilization Director, by Chester Bowles, Price Administrator, Intervenor-Plaintiff,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, Defendants.

FINAL DECREE GRANTING PERMANENT INJUNCTION—January 14, 1944

This action coming on to be heard upon final hearing before a statutory court consisting of Honorable Gerald McLaughlin, Judge of the Circuit Court, and Honorable Guy L. Fake and Honorable Thomas F. Meaney, Judges of the District Court, in which action an amended complaint was filed by the City of Jersey City as plaintiff, against the United States of America, Interstate Commerce Commis-

sion and Hudson & Manhattan Railroad Company, defendants, for the purpose of setting aside, annulling, and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28, U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943, in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), in which action Fred M. Vinson, Director of the Office of Economic [fol. 458] Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration, intervened, and filed his complaint as intervener plaintiff, in the presence of Charles Hershenstein, Charles A. Rooney, and S. S. Eisen, appearing for the plaintiff, City of Jersey City; Harry R. Booth, appearing for Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervener-plaintiff; John F. Finerty and John Buck, appearing for the Hudson & Manhattan Railroad Company, and E. M. Reidy, appearing for the Interstate Commerce Commission, defendants, and the court having examined the pleadings and the record before the Commission and having taken proofs orally in open court and having heard and considered the oral arguments of counsel and the briefs filed, from which good and sufficient cause appears that the City of Jersey City, plaintiff, and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration, intervener-plaintiff are entitled to the relief prayed for, to wit, the setting aside and annulling of said orders of June 8, 1943 and November 2, 1943, and to a perpetual injunction against enforcement so far as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and the Court having filed its opinion and findings of fact and conclusions of law; and upon all the pleadings and proceedings heretofore had herein;

It is, on this 14th day of January, 1944, *Ordered, Adjudged* and *Decreed*, that the rate order issued by Inter-state Commerce Commission of June 8, 1943, in a matter [fols. 459-463] entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan

Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the said defendant, Hudson & Manhattan Railroad Company, are hereby set aside, annulled, and perpetually enjoined, pursuant to Sections 41(28) and 47 of the Judicial Code (Title 28 U. S. C.); and

It is *Further Ordered, Adjudged* and *Decreed,* that the defendants, United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, their agents, representatives, employees and servants, be and they hereby are permanently enjoined and restrained from enforcing and putting into force and effect said orders of the Interstate Commerce Commission bearing date June 8, 1943 and November 2, 1943, hereinabove more particularly referred to, so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and

It is further *Ordered, Adjudged* and *Decreed,* that the proceedings are hereby remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the court filed herein.

Gerald McLaughlin, United States Circuit Court Judge; Thomas J. Meaney, United States District Court Judge.

[fol. 464] In the District Court of the United States

[Title omitted]

Petition for Appeal—Filed February 9, 1944

To the Honorable the Judge Above-named:

The above-named defendants, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, considering themselves aggrieved by the final decree made and entered in the above-entitled cause on January 14, 1944, do hereby appeal therefrom to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith and on the basis of the Supreme

Court's jurisdiction upon appeal to review said order and decree as shown in the Jurisdictional Statement also filed herewith, and pray that said appeal be allowed; that a proper order be made relating to the appeal bond to be [fol. 465] given by defendant Hudson & Manhattan Railroad Company; that a citation be issued as provided by law; and that a transcript of the record, proceedings and papers (or, so far as the Court may direct, the original record in lieu of such transcript) upon which said decree is based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case provided.

Dated, February 9, 1944.

Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission). James B. Emory, Collins & Corbin, John E. Buck, Thomas A. Halleran, John F. Finerty (For Hudson & Manhattan Railroad Company).

[fol. 466] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 9, 1944

Interstate Commerce Commission and Hudson & Manhattan Railroad Company, defendants in the above-entitled cause, file the following assignment of errors with and as part of their petition for appeal to the Supreme Court of the United States from the final decree of the District Court entered January 14, 1944, setting aside, annulling and perpetually enjoining the orders of the Interstate Commerce Commission of June 8, 1943, and November 2, 1943, in "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company", so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan [fol. 467] Railroad Company, and further ordering and decreeing that such proceedings be remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the District Court.

Defendants assert that the District Court, in its decree, findings of fact and conclusions of law, erred in the following respects:

I. The Court erred in setting aside, annulling and perpetually enjoining said orders of the Interstate Commerce Commission and each of them.

II. The Court erred in not dismissing the amended complaint of the plaintiff, City of Jersey City, and in not denying the relief asked in such complaint.

III. The Court erred in not dismissing the intervening petition of the intervenor, and in not denying the relief asked in such intervening petition.

IV. The Court erred in remanding the proceedings to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the Court.

V. The Court erred in refusing to set aside, annul and enjoin said orders of the Interstate Commerce Commission and each of them on the ground that said orders and each of them were based on adequate findings by the Commission supported by substantial evidence before the Commission.

VI. The Court erred in setting aside, annulling and enjoining said orders of the Interstate Commerce Commission and each of them in the absence of any finding by the Court that said orders and each of them were not based on adequate findings by the Interstate Commerce Commission and were without any evidence before the Commission to support them.

[fol. 468] VII. The Court erred in holding as a conclusion of law that

> "1. Both the plaintiff, Jersey City, and the intervenor plaintiff, Director of the Office of Economic Stabilization, are proper parties to bring and maintain this proceeding as plaintiffs herein."

VIII. The Court erred in failing to hold as a conclusion of law that the plaintiff is not a proper party to bring and maintain this proceeding, being estopped so to do, and that the intervenor is not a proper party to bring and maintain

this proceeding, being likewise estopped so to do and being without such interests in said orders of the Interstate Commerce Commission as entitle him as a plaintiff intervenor to maintain this proceeding.

IX. The Court erred in failing to hold as a conclusion of law that the interest of the intervenor in these proceedings, both before the Interstate Commerce Commission and before the District Court, is limited to the question whether such increased fares as were authorized by said orders of the Commission would result in inflation or increased cost of living in contravention of the provisions of the Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50 U. S. C. A., Sec. 901 et seq.) and of the Inflation Control Act of 1942 (Act Oct. 2, 1942, Title 50 U. S. C. A., Sec. 961 et seq.) and that said intervenor has no legal interest in the question whether such increased fares were reasonable or otherwise lawful under the Interstate Commerce Act unless they contravened said Emergency Price Control Act and said Inflation Control Act

X. The Court erred in failing to hold as a conclusion of law that the question whether such increased fares contra- [fol. 469] vene said Emergency Price Control Act and said Inflation Control Act is an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, whose findings and determination in connection therewith the Court can not review unless such findings and determination were made without any evidence to support them.

XI. The Court erred in failing to hold as a conclusion of law that the intervenor, having failed to offer any evidence whatever int he proceedings before the Interstate Commerce Commission to show or intended to show that said increased fares would result in inflation or increased cost of living, and having expressly conceded before the Interstate Commerce Commission that he did not contend that such increased fares in themselves could so result, said intervenor is without such interest in said proceedings before the Commission as would entitle him as a plaintiff intervenor to maintain a complaint or intervention to set aside, annul and enjoin said orders of the Interstate Commerce Commission.

XII. The Court erred in failing to hold as a conclusion of law that in view of the intervenor's express admission

that the intervenor did not contend that said increased fares could themselves result in inflation, the intervenor's mere contention before the Interstate Commerce Commission that such increased fares in conjunction with other increased living costs, as to which costs the intervenor offered no evidence, would result in "an inflationary spiral", is insufficient to establish such interest in said proceedings before the Interstate Commerce Commission as would entitle the intervenor as a plaintiff intervenor to maintain a complaint or intervention to set aside, annul and enjoin said orders of the Interstate Commerce Commission.

[fol. 470] XIII. The Court erred in holding as a conclusion of law that:

> "2. The petition by the defendant carrier, Hudson & Manhattan Railroad Company, to the Interstate Commerce Commission of July 27, 1942 asking for a ten cent fare on its downtown line, was one for additional revenue and the orders of the Commission of June 8, 1943 and November 2, 1943 were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing"

in that the Commission's orders here enjoined do not by their terms purport to be based on said Section 15a * and are amendatory of the Commission's order of July 11, 1938, which was expressly based on both Section 1 and Section 15a of the Act.

XIV. The Court erred in holding as a conclusion of law that:

> "3. Both the plaintiff, City of Jersey City, and the intervenor plaintiff, Director of the Office of Economic Stabilization, properly appeared as protesting parties before the Interstate Commerce Commission and were and are entitled to a full and fair hearing by that Commission"

in so far as the Court failed to hold as a conclusion of law that the intervenor's right to a full and fair hearing by the Interstate Commerce Commission was limited to the right

---

* Presumably the Court meant to refer to Section 15a, which is the so-called "revenue" section of the Act.

to a full and fair hearing solely on the question whether said increased fares would result in inflation or increased cost of living in contravention of the Emergency Price Control Act and the Inflation Control Act, and in failing to hold as a conclusion of law that the intervenor had been accorded such full and fair hearing.

[fol. 471] XV. The Court erred in holding as a conclusion of law that:

> "4. Both the plaintiff and the plaintiff-intervenor, were denied a full and fair hearing in that they were deprived of the right to cross examine witnesses and to present testimony on matters which have a substantial bearing upon the right of the Hudson & Manhattan Railroad Company to fares higher than fares charged on September 15, 1942."

XVI. The Court erred in failing to hold as a conclusion of law that the plaintiff and the intervenor were both accorded a full and fair hearing by the Interstate Commerce Commission.

XVII. The Court erred in failing to hold as a conclusion of law that the matters as to which the Court holds the plaintiff and the intervenor were denied full and fair hearing were matters which both the plaintiff and the intervenor were estopped to raise and were matters in which the intervenor had no legal interest.

XVIII. The Court erred in failing to hold as a conclusion of law that the question whether the matters as to which the Court holds the plaintiff and the intervenor were denied full and fair hearing, are matters which have a substantial bearing upon the right of the defendant Hudson & Manhattan Railroad Company to fares higher than fares charged on September 15, 1942, was an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, whose findings and determination that such matters could have no substantial bearing upon such right of defendant Hudson & Manhattan Railroad Company were conclusive upon the Court.

XIX. The Court erred in failing to hold as a matter of law that the question whether the proceedings before the [fol. 472] Interstate Commerce Commission should be fur-

ther reopened and further hearing granted therein after the further hearing held under the Commission's order of September 18, 1943, was an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, whose determination in relation thereto was conclusive upon the Court.

XX. The Court erred in setting aside, annulling and enjoining said orders of the Interstate Commerce Commission and each of them on the ground that the Commission had refused to receive certain evidence offered by the plaintiff and the intervenor, in the absence of a finding by the Court that had such evidence been received the Commission must as a matter of law have denied the increased rates authorized by its respective orders.

XXI. The Court erred in setting aside, annulling and enjoining said orders of the Interstate Commerce Commission and each of them on the ground that the Commission had refused to receive certain evidence offered by the plaintiff and the intervenor, in the absence of a finding by the Court that had such evidence been received the Commission as a matter of law must have disregarded all other evidence of record which would otherwise have supported such orders.

XXII. The Court erred in holding as a conclusion of law that:

> "5. That the Commission's said orders of June 8, 1943 and November 2, 1943 authorizing increases in fares failed to give effect to the economic stabilization program and efforts of the national government to [fol. 473] keep down the cost of living, particularly in that the Commision erroneously assumed that said increases would not have any effect on the program to keep down the cost of living."

XXIII. The Court erred in failing to hold as a conclusion of law that the effect to be given in connection with the Commission's orders of June 8, 1943, and November 2, 1943, to the economic stabilization program and efforts of the national government to keep down the cost of living, is an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, whose findings and determination in relation thereto are conclusive

upon the Court, and that the Court is without jurisdiction to substitute its judgment for that of the Commission in such respect.

XXIV. The Court erred in holding as a conclusion of law:

"6. That both the plaintiff and the intervenor plaintiff exhausted their administrative remedies before instituting this proceeding."

XXV. The Court erred in failing to hold as a conclusion of law that both the plaintiff and the intervenor, before instituting this proceeding, had wholly failed to exhaust their administrative remedies in connection with the Commission's order of June 8, 1943, and that the plaintiff likewise had wholly failed to exhaust its administrative remedies in connection with the Commission's order of September 15, 1943.

XXVI. The Court erred in holding as a conclusion of law:

"7. That the plaintiff, City of Jersey City, and the intervenor plaintiff, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, are entitled to the setting aside and annulling of said orders of June 8, 1943, and November 2, 1943 and to a perpetual injunction against their enforcement insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company."

[fol. 474] XXVII. The Court erred in holding as a conclusion of law:

"8. That the plaintiff, City of Jersey City, and intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, are not estopped from questioning the validity of the nine cent fare on the downtown line of the defendant, Hudson & Manhattan Railroad as authorized in the Commission's order of June 8, 1943 or the further increases in said downtown fare authorized by the Commission's order of November 2, 1943."

XXVIII. The Court erred in failing to hold as a conclusion of law that both the plaintiff and the intervenor

were and are estopped from questioning the validity of the nine cent fare on the downtown line of the defendant, Hudson & Manhattan Railroad, authorized by the Commission's order of June 8, 1943, and from questioning the further increases in said downtown fare authorized by the Commission's order of November 2, 1943, by reason of the nature of the allegations and prayers of the original complaint herein filed September 13, 1943, and by reason of the Commission's order of reopening of September 18, 1943 thereby induced, and by reason of the subsequent conduct of the plaintiff and the intervenor in connection with such reopening.

XXIX. The Court erred in the following numerous findings of fact relating to major issues of fact before the Court, in that such purported findings of fact are merely verbatim quotations of inaccurate and misleading allegations of the amended complaint of the plaintiff or of other pleadings of the plaintiff or intervenor, unsupported by and contrary to the record before the Court:

A. In its finding of fact No. 12 in that such purported finding of fact consists merely of a substantially verbatim quotation of paragraph 7 of the amended complaint herein, [fol. 475] thereby repeating in such purported finding of fact the misrepresentations made in paragraph 7 of the amended complaint as to the Commission's findings in connection with its original report and order of July 11, 1938, such misrepresentations consisting, among other things, of partial quotations from the Commission's findings and report taken out of their context.

B. In its finding of fact No. 14 in that such purported finding of fact in finding *inter alia* that

> "Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified."

consists merely of a verbatim quotation of the second sentence of paragraph 9 of the amended complaint herein, thereby repeating in such purported finding of fact the misrepresentation made in such portion of paragraph 9 of the

amended complaint as to the nature of the Commission's report, findings and order of June 8, 1943.

C. In its finding of fact No. 15 in that such purported finding of fact consists merely of a verbatim quotation of paragraph 10 of the amended complaint herein, thereby repeating in such purported finding of fact the misrepresentations made in paragraph 10 of the amended complaint as to the Commission's findings in connection with its report and order of June 8, 1943, such misrepresentation consisting, among other things, of partial quotations from the findings and report of the Commission, taken out of their context.

D. In its findings of fact Nos. 16 and 19 in that such purported findings of fact consist merely of a verbatim quotation of Paragraphs 13 and 14 of the amended complaint [fol. 476] (omitting only the last paragraph of Paragraph 14), thereby repeating in such purported findings of fact the misrepresentations made in Paragraphs 13 and 14 of the amended complaint as to the Commission's findings and order of August 3, 1943, of the Commission's original report and order of July 11, 1938, of the decision of the District Court for the District of New Jersey in Hudson & M. R. Co. v. United States, 33 Fed. Sup. 495 and of the decision of the Supreme Court in Hudson & Manhattan R. R. Co. v. United States, 313 U. S. 98; such misrepresentations consisting, among other things, of an insufficient and inaccurate statement of the nature and grounds of the Commission's report, findings and order of June 8, 1943, and August 3, 1943, and of the nature, scope and effect of the decisions of the District Court and of the Supreme Court there referred to.

E. In its finding of fact No. 20 in that such purported finding of fact consists merely of a verbatim quotation of paragraph 21 of the amended complaint herein, thereby repeating in such purported finding of fact the misrepresentations made in paragraph 21 of the amended complaint as to the nature and purpose of the plaintiff's original complaint of September 13, 1943 herein, such misrepresentations consisting, among other things, (a) of the omission of the significant fact that such original complaint raised no question whatever of the validity and reasonableness of the 9 cent fare on the downtown line of the defendant Hud-

son & Manhattan Railroad authorized by the Commission's findings and order of June 8, 1943, but, on the contrary, expressly prayed that the Commission's report and order of August 3, 1943 be set aside, annulled and enjoined, only in so far as such findings and order authorized fares on [fol. 477] said defendant's downtown line in excess of 9 cents, and (b) of the omission of the further significant fact that the fundamental ground alleged in such original complaint as to the invalidity of the Commission's order of August 3, 1943, was that the Commission, before entering that order, had not afforded the plaintiff an opportunity to cross examine or to offer counter evidence with relation solely to the inability of the defendant, Hudson & Manhattan Railroad Company, to collect such authorized 9 cent fare because of the mechanical limitations of its available fare collection boxes.

XXX. The Court further erred in its findings of fact Nos. 12, 14, 15, 18 and 19, in that such findings purport to construe certain findings, reports and orders of the Interstate Commerce Commission and prior decisions of the Court and of the Supreme Court of the United States, which matters are not proper subjects for findings of fact.

XXXI. The Court erred in its finding of fact No. 22, in that said finding is inaccurate as to the nature of the evidence which the plaintiff and intervenor sought to submit and which was excluded by the examiner, and in that said finding misconstrues the relevance to such excluded evidence of the portions of the Commission's report of July 8, 1943, therein quoted out of context.

XXXII. The Court erred in its finding of fact No. 23, in that (a) the condensed income statement therein referred to and there stated to be that of the defendant railroad was shown by uncontradicted evidence before the Court to be not an income statement of the defendant railroad from railroad operations, but to be a consolidated statement of the Hudson & Manhattan Railroad Company's entire cor- [fol. 478] porate income, including its income from its Hudson Terminal office buildings and other non-railroad operations; and (b) in that the remainder of said finding of fact appears from the finding itself to be merely a recital of certain contentions of the plaintiff and intervenor.

XXXIII. The Court erred in its finding of fact No. 24, in that said finding of fact is inaccurate as to the nature and contents of the intervenor's motion of October 14, 1943, for modification and amendment of the Commission's order of September 18, 1943, and in that said finding ignores the fact that the plaintiff, as shown by the Rules of Practice of the Interstate Commerce Commission of record before the Court, could not by the letter referred to in said finding join in such motion of the intervenor.

XXXIV. The Court erred in its findings of fact Nos. 25, 26, 27 and 28, in that said findings of fact are inaccurate as to the nature, contents and effect of the Commission's report and order of November 2, 1943, which matters are not in any event proper subjects for findings of fact.

XXXV. The Court erred in its finding of fact No. 30, in that said finding of fact is inaccurate as to the nature of the estoppel alleged in the amended answer of the defendant Interstate Commerce Commission and in the answer of the defendant, Hudson & Manhattan Railroad Company, as a bar to any right in the plaintiff or in the intervenor to an injunction against the Commission's orders of June 8, 1943, and November 2, 1943.

XXXVI. The Court erred in its finding of fact No. 31, in that said finding of fact is inaccurate as to the Court's own order granting an interlocutory injunction in these pro-
[fol. 479] ceedings, said order in fact restraining and enjoining the defendants for a period of fifty days from the date of said order and until the further order of the Court, and not as stated in said finding merely enjoining the defendants pending final hearing in this proceeding.

XXXVII. The Court erred in failing to make the following findings of fact:

A. That there was evidence of record before the Commission to support its findings and orders of June 8, 1943, and November 2, 1943.

B. That there was ample evidence of record before the Commission with respect to the revenues, expenses and income of defendant Hudson & Manhattan Railroad Company to warrant the Commission in the exercise of its discretion in limiting the further hearing granted by the Com-

mission's order of September 18, 1943, to the specific issues of the inability of such defendant to collect the 9 cent fare authorized by the Commission's findings, report and order of June 8, 1943, and of the propriety and lawfulness of the proposed alternative token and dime fares.

C. That the alleged "Condensed Income Statement" of defendant Hudson & Manhattan Railroad Company, which the intervenor sought to introduce in evidence at the further hearing before the Commission held under its order of September 18, 1943, was of no probative value on the issue of the income of defendant Hudson & Manhattan Railroad Company from its railroad operations, since such statement was a consolidated statement of the Hudson & Manhattan Railroad Company's entire corporate income, including its income from its Hudson Terminal office buildings and other non-railroad operations, from which it would have been impossible to determine the income of such de- [fol. 480] fendant from its railroad operations.

D. That the intervenor, although afforded ample opportunity to do so under the Commission's order permitting his intervention in accordance with the provisions of the Inflation Control Act, neither offered nor introduced any evidence whatever before the Commission to show, or intended to show, that the proposed increases in the fares of the defendant Hudson & Manhattan Railroad Company would result, or tend to result, in inflation or in increased cost of living, but, on the contrary, specifically conceded in his exceptions of March 3, 1943, to the Examiner's proposed report in the proceedings before the Commission that "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

E. That, while the intervenor did contend in the proceedings before the Commission that the proposed increased fares of the defendant Hudson & Manhattan Railroad Company in conjunction with other increased costs of living would result in what the intervenor termed "an inflationary spiral", the intervenor neither offered nor introduced any evidence before the Commission of such other increased costs of living, although afforded ample opportunity to do so.

F. That the allegations of fact set forth in paragraph XXII of the answer of defendant Hudson & Manhattan

Railroad Company to the amended complaint, adopted by defendant Interstate Commerce Commission in its amended answer, as a basis for the defense that the plaintiff cannot maintain such complaint or be accorded the injunctive relief therein prayed because of the plaintiff's failure, before filing such complaint, to exhaust its administrative remedies before the Commission, are supported by the evidence of record before the Court.

[fol. 481] G. That the allegations of fact set forth in paragraph XXII of the answer of defendant Hudson & Manhattan Railroad Company to the amended complaint, adopted by defendant Interstate Commerce Commission in its amended answer, as a basis for the defense that the plaintiff cannot maintain such complaint or be accorded the injunctive relief therein prayed because of certain estoppels arising against the plaintiff by reason of the conduct of the plaintiff specified in said paragraph, are supported by the evidence of record before the Court.

H. That the allegations of fact set forth in paragraph XII of the answer of defendant Hudson & Manhattan Railroad Company to the intervenor's petition for intervention, adopted by defendant Interstate Commerce Commission in its amended answer, as a basis for the defense that the intervenor cannot maintain such petition or be accorded the injunctive relief therein prayed because of the intervenor's failure, before filing his petition for intervention and other relief, to exhaust his administrative remedies before the Commission, are supported by the evidence of record before the Court.

I. That the allegations of fact set forth in paragraph XII of the answer of defendant Hudson & Manhattan Railroad Company to the intervenor's petition for intervention, adopted by defendant Interstate Commerce Commission in its amended answer, as a basis for the defense that the intervenor cannot maintain such petition or be accorded the injunctive relief therein prayed because of certain estoppels arising against the intervenor by reason of the conduct of the intervenor specified in said paragraph, are supported by the evidence of record before the Court.

Wherefore, defendants appellants Interstate Commerce Commission and Hudson & Manhattan Railroad Company

[fol. 482] pray that said final decree entered January 14, 1944, be reversed.

Dated February 9, 1944.

Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission); James B. Emory, Collins & Corbin, John E. Buck, Thomas A. Halleran, John F. Finerty (For Hudson & Manhattan Railroad Company).

[fol. 483] In the District Court of the United States

[Title omitted]

Order Allowing Appeal—February 9, 1944

In the above-entitled cause, the Interstate Commerce Commission and Hudson & Manhattan Railroad Company, defendants, having made and filed a Petition for Appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on January 14, 1944, and having also made and filed an Assignment of Errors, and a Jurisdictional Statement, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby, allowed as prayed for; and it is

Further Ordered that a certified transcript of the record herein be transmitted in due course to the Supreme Court of the United States (except as the Court may direct that [fol. 484] part of the original record herein shall be transmitted in lieu of a transcript thereof); and it is

Further Ordered that the bond of defendant Hudson & Manhattan Railroad Company on said appeal be fixed at the sum of One thousand dollars ($1,000), the same to be and act as a bond for costs but not as a supersedeas; and that the appeal bond in the sum of One thousand dollars ($1,000), wherein said defendant is principal and United States Fidelity and Guaranty Company is surety, conditioned for payment of costs upon said appeal and presented

for approval be, and it hereby is, approved and ordered filed.

Dated February 9, 1944.

Thomas F. Meaney, United States District Judge.

[fols. 485-486] Citation in usual form showing service on Charles H. Hershenstein and Harry R. Booth omitted in printing.

[fols. 487-489] Cost Bond on Appeal for $1000.00 approved and filed February 9, 1944, omitted in printing.

[fol. 490] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO ATTORNEY GENERAL OF NEW JERSEY—Filed February 9, 1944

To: The Attorney General for the State of New Jersey:

You are hereby notified that the District Court of the United States for the District of New Jersey, on February 9 1944, filed and entered an order allowing an appeal by defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company to the Supreme Court of the United States from a final decree filed and entered on the 14th day of January, 1944, in the above-entitled cause, and that the citation signed by such Court on February 9, 1944, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following docu-
[fol. 491] ments: the citation referred to above, the petition for and the order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the statement required to be served on appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, sec. 47a, enacted March 3, 1911, c. 231,

sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated February 9, 1944.

Daniel W. Knowlton, Chief Counsel; E. H. Reidy, Assistant Chief Counsel, (for the Interstate Commerce Commission); James B. Emory, Collins & Corbin, John E. Buck, Thomas A. Halleran, John F. Finerty, (For Hudson & Manhattan Railroad Company.).

Received a copy of the foregoing notice this 10 day of February, 1944.

Walter D. Van Riper, For the Attorney General of the State of New Jersey.

[fol. 492] In the District Court of the United States

[Title omitted]

Order as to Exhibits—Filed Feb. 9, 1944

In accordance with the provisions of the praecipe for consolidated transcript of record of defendants-appellants Interstate Commerce Commission and Hudson & Manhattan Railroad Company, on the joint appeal of said defendants from the final decree granting a permanent injunction, entered in the above-entitled cause on January 14, 1944, and on the separate appeal of defendant Hudson & Manhattan Railroad Company from the order granting an interlocutory injunction, entered in the above-entitled cause on November 26, 1943, and it appearing that the parties have consented thereto, it is hereby

Ordered that the Clerk of this Court transmit as part of the consolidated record on the respective appeals of said defendants herein to the Supreme Court of the United States, with the consolidated transcript of record as designated in the praecipe filed herein, and in lieu of a tran-
[fol. 493] script thereof, the original of the record of proceedings before the Interstate Commerce Commission in I. & S. Docket No. 4394, *Passenger Fares of the Hudson & Manhattan Railroad Company*, identified in said praecipe as Exhibits P-1 to P-9, inclusive, Intervenor's Exhibits 1 to 4, inclusive, Exhibits for H&M D-1 to D-11, inclusive, and Exhibits for I. C. C. D-1 to D-3, inclusive, all of which documents and papers were filed of record with this Court on December 14, 1943; and it is hereby

Further ordered that the Clerk attach thereto his certificate that said Exhibits are part of the original record before this Court.

Dated, February 9, 1944.

Thomas F. Meaney, United States District Judge.

We consent to the entry of the above order by the Court.

Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel (for the Interstate Commerce Commission). James B. Emory, Collins & Corbin, John E. Buck. Thomas A. Halleran. John F. Finerty, (For Hudson & Manhattan Railroad Company). Charles E. Hershenstein. Harry R. Booth, (attorneys for Plaintiff and Intervenor).

February 9, 1944.

[fol. 494] In the District Court of the United States

[Title omitted]

Stipulation as to Record—Filed Feb. 9, 1944

It is hereby stipulated that the portions of the record to be included in the transcript on the joint appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from the final decree granting a permanent injunction dated January 14, 1944, and on the separate appeal of defendant Hudson & Manhattan Railroad Company from the order granting an interlocutory injunction dated November 26, 1943, shall be those portions thereof which are designated in the annexed Praecipe for Consolidated Transcript of Record, dated February 9, 1944.

The undersigned attorneys for the plaintiff and the intervenor hereby admit service of such Praecipe for Consolidated Transcript of Record and receipt of a copy thereof.

Dated, February 9, 1944.

Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel. (For the Interstate [fol. 495] Commerce Commission). James B. Emory, Collins & Corbin. John E. Buck. Thomas A. Halleran. John F. Finerty. (For Hudson & Manhattan Railroad Company.) Charles E. Hershenstein, Attorney for Plaintiff. Harry B. Booth, Attorney for Intervenor.

[fol. 496] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEFENDANTS'-APPELLANTS' PRAECIPE FOR CONSOLIDATED TRANSCRIPT OF RECORD—Filed February 9, 1944

* * * * * * *

To the Clerk of the Above-named Court:

You are hereby requested to prepare a consolidated transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to appeals allowed therein, respectively, from the final decree granting a permanent injunction, dated January 14, 1944, and from the order granting an interlocutory injunction, dated November 26, 1943, and to include in such consolidated transcript of record the items hereinafter specified. [fol. 497] The record on the joint appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from the final decree granting a permanent injunction is to consist of the items designated by a dagger (†). The record on the separate appeal of defendant Hudson & Manhattan Railroad Company from the order granting an interlocutory injunction is to consist of and be limited to the items designated by an asterisk(*).

*†(1) Original complaint, filed September 13, 1943, and Exhibits 1-5, inclusive, attached thereto.

*†(2) Summonses served upon the United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, together with acknowledgments of service thereof.

*(3) Order convening statutory court and setting case for hearing on September 21, 1943, on application for interlocutory injunction based on original complaint, filed September 14, 1943.

*†(4) Answer of Interstate Commerce Commission to original complaint, filed September 25, 1943.

*†(5) Stipulations and orders extending time of Hudson & Manhattan Railroad Company to answer original complaint until November 15, 1943, and December 8, 1943.

*†(6) Motion by plaintiff for leave to file amended complaint, filed November 18, 1943.

*†(7) Order of Court granting plaintiff leave to file amended complaint and setting case for hearing on November 24, 1943, on application for interlocutory injunction based on amended complaint, filed November 18, 1943.

*†(8) Amended complaint, filed November 18, 1943, and Exhibits 1-7, inclusive, attached thereto.

*†(9) Motion for leave to file petition for leave to intervene by OPA and Director of Economic Stabilization, filed November 19, 1943.

*†(10) Petition for leave to intervene by OPA and Director of Economic Stabilization, Exhibit A, and other papers attached to said petition, filed November 19, 1943.

*†(11) Order of Court granting petition for leave to intervene by OPA and Director of Economic Stabilization, filed November 24, 1943.

[fol. 498] *†(12) Answer of Hudson & Manhattan Railroad Company to amended complaint, and Exhibits A, B and C thereto, filed December 6, 1943.

*†(13) Answer of Interstate Commerce Commission to amended complaint, filed December 1, 1943.

*†(14) Answer of United States of America to amended complaint, filed November 24, 1943.

*†(15) Answer of Hudson & Manhattan Railroad Company to petition of OPA and Director of Economic Stabilization, filed December 9, 1943.

*†(16) Answer of Interstate Commerce Commission to intervening petition of OPA and Director of Economic Stabilization, filed December 4, 1943.

*†(17) Amended answer of Interstate Commerce Commission to amended complaint and to intervening petition, filed December 11, 1943.

*(18) Transcript of and record on hearing before three-judge court, November 24 and 26, 1943, on application for interlocutory injunction.

*(19) Affidavit of Walter F. Brown, dated November 24, 1943.

*(20) Affidavit of Arthur Potterton, dated November 26, 1943.

*(21) Interlocutory injunction dated November 26, 1943.

*(22) Findings of Court and order dated November 26, 1943.

*(23) Petition for appeal of defendant Hudson & Manhattan Railroad Company from interlocutory injunction, filed December 24, 1943.

*(24) Assignments of error of defendant Hudson & Manhattan Railroad Company, filed December 24, 1943.

*(25) Jurisdictional statement by defendant Hudson & Manhattan Railroad Company under Rule 12 of the Revised Rules of the Supreme Court of the United States, filed December 24, 1943.

*(26) Bond on appeal of defendant Hudson & Manhattan Railroad Company, filed December 24, 1943.

*(27) Order allowing appeal of defendant Hudson & Manhattan Railroad Company from interlocutory injunction, filed December 24, 1943.

*(28) Citation on appeal issued at instance of defendant Hudson & Manhattan Railroad Company with acknowledgment of service thereof, filed December 24, 1943.

[fol. 499] *(29) Statement by defendant-appellant, Hudson & Manhattan Railroad Company, directing attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States with acknowledgment of service thereof, filed December 29, 1943.

*(30) Order of Court enlarging until March 24, 1944, the time of defendant Hudson & Manhattan Railroad Company to docket the case and file the record on appeal from interlocutory injunction, filed —— —, 1944.

†(31) Transcript of hearing before three-judge court, December 14, 1943, on application for permanent injunction.

†(32) Opinion of Court with respect to permanent injunction, filed January 12, 1944.

†(33) Findings of Fact and Conclusions of Law with respect to permanent injunction, entered by Court on January 12, 1944.

†(34) Final decree granting permanent injunction, dated January 14, 1944.

†(35) Notice of appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from permanent injunction, with acknowledgment of service thereof.

†(36) Petition for appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from permanent injunction, filed Feb. 9, 1944.

†(37) Assignments of Error of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company, filed Feb. 9, 1944.

†(38) Jurisdictional statement by defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company under Rule 12 of the Revised Rules of the Supreme Court of the United States, filed Feb. 9, 1944.

†(39) Bond on appeal of defendant Hudson & Manhattan Railroad Company, filed Feb. 9, 1944.

†(40) Order allowing appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from Permanent injunction, filed Feb. 9, 1944.

†(41) Citation on appeal issued at instance of defendants Interstate Commerce Commisison and Hudson & Manhattan Railroad Company with acknowledgment of service thereof, filed Feb. 9, 1944.

†(42) Notice to Attorney General of State of New Jersey, with acknowledgment of service thereof.

†(43) Statement by defendants-appellants, Interstate Commerce Commisison and Hudson & Manhattan Railroad Company, directing attention to Paragraph 3 of Rule 12 [fol. 500] of the Revised Rules of the Supreme Court of the United States with acknowledgment of service thereof, filed February 9, 1944.

†(44) Order of Judge Meaney, dated February 9, 1944, directing the Clerk to transmit original record to Supreme Court of the United States, and consent of counsel thereto.

*†(45) Praecipe for consolidated transcript of record and acknowledgment thereof.

*†(46) All docket entries in their appropriate order.

Said transcript is to be prepared as required by law and the rules of this Court and by the rules of the Supreme Court of the United States.

You are also requested, in accordance with the order directing that part of the original record be transmitted upon appeal, entered by this Court on February 9, 1944, to transmit as part of the consolidated record on the respective appeals of said defendants herein the original of the record of proceedings before the Interstate Commerce Commission as filed with this Court on December 14, 1943, identified as follows:

*† P-1 Transcript of hearings before Interstate Commerce Commission.

*† P-2 Interstate Commerce Commission order of June 8, 1943.

*† P-3 Interstate Commerce Commission order of November 2, 1943.

*† P-4 Interstate Commerce Commission order of July 11, 1938.

*† P-5 Interstate Commerce Commission report of August 3, 1943.

*† P-6 Petition of Hudson & Manhattan Railroad Company, dated July 8, 1943.

*† P-7 Reply of protestants dated July 14, 1943.

[fol. 501] *† P-8 Interstate Commerce Commission order of September 18, 1943, reopening proceedings.

*† P-9 Brief of protestants on further hearing commencing September 28, 1943.

Intervenors

Exhibits		Description
*†	1	Motion of Economic Stabilization Director, dated October 14, 1943 (Exhibit C attached to intervening petition, pages 26-29).
*†	2	Reply of Director and Administrator, dated July 19, 1943, to petition for reconsideration and modification.

*† 3 Exceptions filed on behalf of Administrator to report of examiner, dated March 8, 1943.

*† 4 Brief of Economic Stabilization Director upon reopened hearing, dated October 14, 1943.

Exhibits for H. & M.

*† D-1 Reply of Hudson & Manhattan Railroad Company to motion of Economic Stabilization Director for modification and amendment of Commission's order of September 18, 1943.

*† D-2 Letter from plaintiff's counsel to Interstate Commerce Commission dated October 26, 1943, adopting petition of Price Administrator for modification.

*† D-3 Petition of Hudson & Manhattan Railroad Company, dated June 27, 1942, for reopening of proceedings, etc.

*† D-4 Reply of City of Jersey City to plaintiff's petition for reopening, dated July 6, 1942.

*† D-5 Reply of Hudson Bus Transportation Company, et al., to plaintiff's petition for reopening, dated July 10, 1942.

*† D-6 Copy of letter dated October 17, 1942, from Harry R. Booth to Interstate Commerce Commission, asking leave to file brief as intervenor.

*† D-7 Notice and consent to intervention directed to Price Administrator by the Hudson & Manhattan Railroad Company, dated November 9, 1942.

*† D-8 Report proposed on further hearing, by Examiner Trezise of the Interstate Commerce Commission.

[fols. 502-503] *† D-9 Exceptions by New Jersey protestants to report proposed by Examiner Trezise.

*† D-10 Reply of plaintiff to exceptions to report of Examiner Trezise, dated March 18, 1943.

*† D-11 Stipulation between counsel for the various parties, upon oral argument before Interstate Commerce Commission on April 20, 1943, as to certain traffic statistics.

Exhibits for I.C.C.	Description
*† D-1	Interstate Commerce Commission order of July 13, 1942, reopening case on petition of Hudson & Manhattan Railroad Company.
*† D-2	Interstate Commerce Commission order of November 13, 1942, granting OPA right to intervene.
*† D-3	Transcript of oral argument before Interstate Commerce Commission, April 20, 1943.

Dated, February 9, 1944.

Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel (For the Interstate Commerce Commission). James B. Emory, Collins & Corbin, John E. Buck, Thomas A. Halleran, John F. Finerty (For Hudson & Manhattan Railroad Company).

[fol. 504] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRIES

1943		
September	13	Complaint filed.
	13	Summons issued.
	14	Order setting cause down for hearing, filed.
	17	Summons returned served on The Attorney General and Interstate Commerce Commission by mail on September 14, 1943, served on Hudson & Manhattan R. R. Co. by leaving with Ed. Markley, Member of firm of Attorneys of said R. R. Co. on September 16, 1943 and on U. S. A. by serving Charles M. Phillips, U. S. Dist. Attorney, personally on September 14, 1943, filed.
	25	Answer of Interstate Commerce Commission, filed.
	27	Notice of fixing place of trial, filed.
October	8	Stiplation and order extending time of Hudson & Manhattan R. R. Co. to answer etc., to 11/15/43, filed.

November 3 Call of Calendar—Case marked ready.
18 Notice of motion to file amended complaint, amended complaint, etc., filed (Meaney).
18 Order that leave be granted to plaintiff to file amended Complaint &c. (M).
19 Notice of motion for leave to file and serve; petition of Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Adm., etc. for Leave to intervene, etc., filed.
19 Stipulation and Order that time of defendant to file answer or motion to dismiss, etc. be extended to December 6, 1943, filed.

[fol. 505]

1943

November 24 Statutory Hearing. Ordered Motion for leave to file answer on behalf of United States granted. Ordered motion for order permitting Fred M. Vinson, Director of the Office of Economic Stabilization by Chester Bowles, Price Administrator, to intervene, granted. Court continued case until 11/26/43.
24 Order permitting intervention of Fred M. Vinson, Director, etc., filed.
24 Answer of United States, filed.
24 Affidavit in opposition to motion for interlocutory inj. filed.
26 Statutory Hearing continued. Order for interlocutory injunction granted. Motion that City of Jersey City post bond denied.
26 Replying Affidavit of Arthur Potterton, filed.
26 Order for Interlocutory Injunction and Restraint and order that final hearing in case be 12/14/43, filed.
30 Notice of "Supplement No. 2 to I. C. C. No. 53 Cancelling Supplement No. 1, filed.

December 1 Answer of Interstate Commerce Commission to Amended Complaint, filed.
1 Per Curiam Opinion, filed (McLaughlin, Fake & Meaney).

DOCKET ENTRIES—Continued

1943		
December	4	Answer of Interstate Commerce Commission to Intervening Petition of Economic Stabilization Director and Price Administrator, filed.
	6	Answer of Defendant, Hudson & Manhattan R. R. Co., to Amended Complaint, filed, C. & C.
	9	Answer of Defendant, Hudson & Manhattan R. R. Co., to the Petition of Fred M. Vinson, for leave to Intervene, for an Interlocutory Injunction and for other relief, filed.
	11	Amended answer of Interstate Commerce Commission to Amended Petition of City of Jersey City, et al., and Intervening Petition of Office of Price Administration and Director of Economic Stabilization, filed.
	14	Statutory Hearing Continued. Decision Reserved, Briefs to be submitted.
	24	Petition for Appeal, Order Allowing Appeal, and assignment of errors, filed.
	24	Bond on Appeal, filed.
	24	Jurisdictional Statement, filed.
	24	Citation to City of Jersey City, returnable on the 24th day of January, 1944, filed.

[fol. 506]

1943		
December	29	Statement by Defendant-Appellant, Hudson & Manhattan Railroad Co., directing attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, filed.
1944		
January	12	Opinion filed.
	12	Findings of Fact and Conclusions of Law, filed.
	13	Objections of Intervenor Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator to appeal to Defendant Hudson and Manhattan Railroad Co., from order granting Interlocutory Injunction, and motion to dismiss said Appeal, filed.

DOCKET ENTRIES—Continued

1944
January 13 Certificate of Service, filed.
14 Final Decree for permanent injunction, filed.
14 Charge for filing pet. for appeal (12/24/43).
14 Judgment for costs in favor of the City of Jersey City, et al. and against Hudson & Manhattan Railroad Co., entered (Notice sent Attys.).
17 Objections of City of Jersey City, Plaintiff, to Appeal of Defendant, Hudson & Manhattan R. R. Co., from order granting Interlocutory Injunction and Motion to dismiss said appeal, filed.
20 Copy of Stipulation and order enlarging time of defendant, Hudson & Manhattan R. R. Co., to docket and file the record with the Clerk of the Supreme Court to 3/24/44, filed.
24 Original order enlarging time of defendant to docket and file the record, etc., sent to Clerk of Supreme Court.
February 9 Notice of Appeal, filed (I. C. C., et al.).
9 Petition for appeal, Order allowing appeal and Assignment of errors, filed.
9 Citation issued, returnable March 8, 1944.
9 Citation ret'd., service acknowledged.
9 Jurisdictional statement by defendants under Rule 12, filed.
9 Statement of Defendants-Appellants directing attention to Par. 3 of Rule 12, filed.
9 Appeal bond, filed.
9 Order as to exhibits, filed.

[fol. 507]
1944
February 9 Stipulation and Defendants'-Appellants' Praecipe for consolidated transcript of record on joint appeal of Defendants Interstate Commerce Commission & Hudson & Manhattan Railroad Company from final decree granting permanent injunction and on separate appeal of defendant Hudson & Manhattan Railroad Company from or-

DOCKET ENTRIES—Continued

1944		
February	9	der granting interlocutory injunction, filed. of New Jersey & acknowledgement of service, filed.
	10	Notice to Attorney General for the State.
March	3	Acknowledgments of service of citation issued December 1, 1943, filed.

[fol. 508] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 509] PLAINTIFF'S EXHIBIT "2"

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4394

Passenger Fares of Hudson & Manhattan Railroad Company

Submitted April 20, 1943. Decided June 8, 1943

Upon further hearing conclusion in prior report, 227 I. C. C. 741, that a proposed 10-cent passenger fare of the Hudson & Manhattan Railroad Company between Jersey City and Hoboken, N. J., and Hudson Terminal, New York, N. Y., had not been justified, affirmed, but without prejudice to the establishment of a fare of 9 cents. Original conclusion and order modified accordingly.

John F. Finerty, E. Fontaine Broun, and John E. Buck for respondent.

Milton P. Bauman, Theodore C. Baer, Charles A. Rooney, Charles Hershenstein, Michael J. Bruder, John N. Platoff, Nicholas S. Schloeder, James C. Agnew, Irwin Rubenstein, John J. Fallon, James A. Coolahan, S. S. Eisen, Kenneth S. Carberry, William Regar, William J. Tomasso, and John P. Nolan for protestants.

David Ginsburg, Harold Leventhal, Harry R. Booth, W. Russell Gorman, and Julius L. Schapiro for Office of Price Administration.

William L. Bevan for Board of Public Utilities Commission, State of New Jersey.

Report of the Commission on Further Hearing

PORTER, Commissioner:

Exceptions to the report proposed by the examiner were filed by the New Jersey protestants and the Federal Price Administrator on behalf of the Director of Economic Stabilization, to which respondent replied. The issues were again orally argued before us. Our conclusions differ somewhat from those recommended by the examiner.

In the original report, 227 I. C. C. 741, decided July 11, 1938, we found that a proposed increase from 6 cents to 10 cents in the passenger fare maintained by respondent Hudson & Manhattan Railroad Company on its downtown line between Jersey City and Hoboken, N. J., and Hudson Terminal, New York, N. Y., had not been justified, but that an 8-cent fare had been justified. A fare of 8 cents became effective July 25, 1938, and has since been maintained. Upon petition of respondent for further hearing and for leave to publish and charge a 10-cent fare by reason of alleged changed conditions, the proceeding was reopened for further hearing, which has been had.

Our order accompanying the original report was upheld by the United States District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *United States*, 33 Fed. Supp. 495, which was affirmed by the Supreme Court. *Hudson & Manhattan R. Co.* v. *U. S.*, 313 U. S. 98.

Thereafter, upon petition of rail carriers generally, seeking increases in their rates, fares, and charges, by order of January 21, 1942, we authorized a 10 per cent increase in passenger fares, which became effective February 10, 1942.[1] [fol. 510] Respondent's name was included in the list of those petitioners, and, therefore, it was also embraced in our permissive order, but this was done without respondent's authority or approval. The authority thus granted to respondent would have permitted an increase in its downtown fare from 8 cents to 9 cents, and in its uptown fare from 10 cents to 11 cents. Respondent did not avail itself of this authority, and by letter of February 18, 1942, advised us that it had no intention of doing so, and that it intended to petition for reopening of this proceeding and

[1] *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545.

seek an increase in its downtown fare to 10 cents as the only means of alleviating its financial condition.

Facts set forth in the prior report will be restated here only where necessary to a clear understanding of the issues.

The conclusion in the original report that the proposed fare of 10 cents would be unreasonable was based upon two principal grounds: First, that "placed alongside the fares or charges of record, other than those on the city-subsidized New York subways, for somewhat similar transportation services on other lines in the New York metropolitan area, a maximum reasonable local fare on the downtown line of respondent may not exceed 8 cents," and second, that "the revenue results to respondent, especially over an extended period of time, would be more favorable under an 8-cent than under a 10-cent fare on the downtown line."

On pages 752 and 758-60 of the prior report are set forth numerous representative fare charged at that time by other railroads, or by busses and railroads, for commutation service to and from New York. All of those fares by railroad, except a few applying intrastate, were increased 10 per cent under our authority of January 21, 1942. That authority insofar as it related to commutation fares was revoked and such fares were required to be reduced to their former level by our order of April 6, 1943, pending further investigation of commutation fares generally.[2] The record has now been supplemented by additional comparisons between the proposed fare, which would apply for an average distance between Hudson Terminal and the respective New Jersey stations of 2.26 miles, and commutation fares maintained by other railroads at the time of the hearing, but since reduced by 10 per cent, of which the following are representative: A 12-trip weekly ticket of the Central Railroad Company of New Jersey between Jersey City or New York, on the one hand, and various New Jersey points, on the other, for distances from Jersey City of from 1.3 to 3.2 miles, averaging 9.2 cents per trip. A 60-trip monthly ticket on the same road between Newark and Newark Transfer, N. J., 2.5 miles, averages 7.3 cents. Between Newark and East Orange, N. J., 2.2 miles, on the Delaware, Lackawanna & Western Railroad, an unlimited-trip monthly ticket averages 7.9 cents for 60 rides. On the Pennsylvania between

[2] *Increased Railway Rates, Fares, and Charges, 1942*, I. C. C.

Market Street, Newark, and North Elizabeth, N. J., 4.4 miles, a 60-trip monthly ticket averages 9.1 cents. On the Erie a like ticket between North Newark and Walnut Street, Bloomfield, N. J., 2.3 miles, averages 8.4 cents, and on the Lehigh Valley between Newark and Townley, N. J., 2.7 miles, a similar ticket averages 7.3 cents.

The operating ratio of respondent for 1940, the latest year for which this data is of record, was about 53 per cent, while that of rapid-transit and bus lines in New York and New Jersey ranged from 79.35 to 96.16 per cent. In the same year respondent's passenger operating revenue per car-mile was about 69 cents, compared with from 12.22 to 33.46 cents per car-mile or bus mile on the rapid transit and bus lines in New York and New Jersey.

Respondent seeks to justify the proposed fare increase chiefly by reason of its alleged need for additional revenue. It points out that the conditions upon which the foregoing finding with respect to the future revenue results under an 8-cent as contrasted with a 10-cent fare was made are now materially changed, as will presently be discussed, and that [fol. 511] a 10-cent fare could now be expected to yield substantially greater revenue than the present 8-cent fare. It states that it has no other traffic which can be relied upon to augment its revenues to the necessary extent. There is nothing on this record to indicate that greater revenue could be obtained from an increase in any of respondent's other local fares.

The capital securities of respondent outstanding at the end of August, 1942, and allocable to the railroad properties were $88,456,877, of which $50,889,418 was funded debt and $37,557,459 stock. Funded debt consisted of $783,520 of first mortgage 4.5 per cent bonds, $26,572,948 of first lien and refunding 5 per cent bonds, and $23,542,950 adjustment income 5 per cent bonds. Since 1932 respondent has failed to earn its bond interest by varied amounts from $279,078 in 1934 to $655,164 in 1937, $1,113,350 in 1938, $806,048 in 1939, $817,424 in 1940, and $892,148 in 1941, so that the accumulated and unpaid interest on the adjustment income bonds as of December 31, 1941, was $5,494,727. No dividends have been paid on stock since 1933, and under the adjustment mortgage none can be declared until all current and accumulated interest on the income bonds has been paid.

The cost of its railroad properties less retirements as of August 31, 1942, is shown by respondent as $66,541,352. At the original hearing herein a civil engineer of long experience estimated on behalf of respondent that the reproduction cost of its railroad properties new, on the basis of 1914 prices, less depreciation, was about $68,273,000. The original cost less depreciation does not appear. In contrast, as stated, its capital securities outstanding in the hands of the public as of the end of August, 1942, allocable to railroad properties on the basis of the funded debt ratio employed by respondent of 83 per cent to railroad properties and 17 per cent to non-railroad properties, were $88,456,877. In *Local Fares of Hudson & Manhattan R. R.*, 58 I. C. C. 270, decided August 9, 1920, wherein fares of 6 cents downtown and 10 cents uptown were approved, we found the indicated cost of all of respondent's properties at that time to be about $60,000,000, divided $51,000,000 for the railroad properties and $9,000,000 for the non-railroad properties, reflecting a ratio of 85 to 15. That report shows that at the end of 1919 the securities outstanding or about to be issued totaled $124,860,274, of which $79,623,233 was funded debt and $45,237,041 stock. On the basis of the ratio there used, the portion of that total allocable to the railroad properties was $106,131,233, divided $67,679,748 funded debt and $38,451,485 stock. It thus appears that in the 23-year period from 1919 to 1942, the outstanding securities allocable to the railroad properties were reduced in net amount by $17,674,356, of which $16,780,330 was funded debt. Of the latter amount $7,238,000 was eliminated by the purchase of bonds at a discount in the last six years, $991,000 thereof in 1942 up to the end of August. A total saving has thus been effected of $6,495,696.92, which includes $1,473,310.43 in interest on bonds reacquired for a property amortization fund maintained by respondent from the date of acquistion in 1936 to August 31, 1942. A saving at the rate of $427,000 per year in interest charges was realized as the result of bonds held for this fund as of the latter date.

This practice of reacquiring bonds by an expenditure of assets, averaging in the last several years over $40,000 per month, through a so-called amortization fund is criticized by protestants on the ground that, according to their understanding, such funds used to purchase bonds are charged directly or indirectly to operating expenses. This fund has

been voluntarily created by the carrier and approximates the credit balance in the depreciation reserves. Only that part of such reserves relating to transportation property, averaging approximately $17,500 per month in 1942, is derived by charges to operating expenses. Respondent explains that the amortization fund is set aside for the purpose of providing assets for replacements and rehabilitation of the property, and that such assets in that fund as have not [fol. 512] been needed for that purpose have been used to reacquire some of its bonds. There is no indication that the amounts thus set aside for this fund are greater than warranted for the purposes for which the fund was created.

Most of respondent's stock was distributed initially with bonds as a bonus. In the report last above referred to, page 276, is the statement that when respondent was then asking our approval of the increased fares therein authorized, it was "not seeking additional revenue for the purpose of paying dividends on the stock, but only to provide payment of interest on its funded debt." Nevertheless, dividends were paid on its preferred stock each year from 1923 to 1933, inclusive, and on its common stock each year from 1925 to 1932, inclusive. The total dividends thus paid aggregated $2,751,444.73 on the preferred stock and $8,651,051.10 on the common stock, or a total of $11,402,495.83. The payment of those dividends resulted in income deficits in 1931, 1932, and 1933 of $22,334.65, $547,184.99, and $348,295.16, respectively. Protestants insist that, instead of these dividend payments on stock most of which represented no investment, at least a major portion and perhaps all of those assets should have been used for the reduction of respondent's indebtedness, and that had this been done respondent might not *how* be here seeking additional revenue by a fare increase. Assuming that respondent could then have repurchased sufficient of its 5 per cent bonds at face value, and had all of those dividend payments been so applied, the present annual bond interest would be less by about $570,000.

Under the existing 8-cent fare, established July 25, 1938, respondent states that it has earned greater revenue, both gross and net, each year since 1938 than it would have earned under its former 6-cent fare. It estimates that in 1941 the gross revenue under the 8-cent fare was $236,210 greater than it would have been under a 6-cent fare during the same period, assuming that under a 6-cent fare the diver-

sion of passengers which was incident to the increase to the 8-cent fare had not occurred. That increase in gross revenue, however, was more than offset by increases in costs of labor and taxes compared with 1937, the year prior to the establishment of the 8-cent fare.

Total operating expenses increased in 1941 over 1937 by about $205,000, or 6.3 per cent, although the number of car-miles was reduced by 5.27 per cent. The major item responsible for the increase in operating expenses was a 12 per cent increase in labor costs. Expenses for materials and supplies and operating expenses other than labor decreased $17,000, or 1.45 per cent. Taxes increased approximately $72,000, or 8.45 per cent. The increase in labor costs was about equally divided between the uptown and downtown lines, the total operating expenses in both 1937 and 1941 having been divided about equally between those two lines; but the increase in taxes applied more heavily to the downtown line. Of the total increase of about $72,000 in taxes, $48,000 applied to the downtown line and $24,000 to the uptown line.

Traffic decline from 77,989,857 passengers in 1937 to 65,847,289 in 1941, or by 15.57 percent, which respondent claims resulted from the same general factors which we found in our original report were responsible for the reduction in the period from 1929 to 1937. Those factors were the continuance of the economic depression, increased competition of private automobiles and motor busses using the George Washington Bridge and the Lincoln and Holland tunnels, and, later, the closing of the Thirty-third Street station on respondent's uptown line between December 25, 1937, and September 24, 1939, necessitated by the construction by the City of New York of its Sixth Avenue subway line. The loss of passenger traffic from 1937 to 1941 continued despite the fact that in 1939 and 1940 respondent's traffic was augmented on its uptown line during the period of the New York world's fair, and despite an increase in the joint traffic with the Pennsylvania between Newark and Hudson Terminal in the latter part of 1940.

The conditions which we found motivated the traffic de- [fol. 513] cline prior to 1938 have now materially changed. The incidence of war conditions within the last year or more has arrested the decline of respondent's traffic and actually augmented it. Many private automobiles as a con-

petitive factor have been eleminated by restrictions on the purchase of automobiles and tires, and by rationing of gasoline. War industries in the New Jersey area tributary to the respondent's lines have been expanded and new ones established, resulting in a substantial increase in the employment of war workers. Numerous army cantonments in this area have been erected and are being expanded. Moreover, the establishment of offices for war industries, government departments, and military and naval services in downtown Manhattan have increased the number of office workers who patronize respondent's line to and from Jersey City. There is no dispute concerning these altered conditions.

Concurrently, a substantial increase in operating costs has occurred incident to the conditions already described. As a result of mediation by the National Mediation Board, about 80 percent of respondent's employees have had their aggregate wages increased since 1941 by approximately $181,000 per annum, and respondent estimated that increases would soon be made in the wages of the other 20 percent, the total annual increase aggregating about $226,500. Furthermore, respondent states that it must afford protection to safeguard its property from possible contingencies incident to war conditions, at an estimated additional cost of about $20,000 per month, and that amount is being set aside for the purpose. Costs of materials and supplies have recently increased somewhat and are expected to continue to mount. Also, an increase in federal taxes, and perhaps in State taxes, is anticipated. The constitutionality of the New Jersey railroad tax law of 1941 as amended in 1942, is being contested by the City of Jersey City and other communities, and certain taxpayers. Should the 1942 amendment be held to be unconstitutional a heavy tax increase will be imposed by the State of New Jersey. Aside from these contingent increases in operating costs for materials, supplies, and taxes due to the war, respondent's estimated operating costs for labor and for a reserve against war hazards will aggregate at least $466,500 per year in excess of such costs in 1941. Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about 30 percent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness.

Studies of one of respondent's witnesses indicate that should petitioner have availed itself of the benefits of our order of January 21, 1942, and increased the downtown fare to 9 cents and the uptown fare to 11 cents, the increase in both gross and net revenue realized would have been less than under an increased downtown fare of 10 cents without an increase in the uptown fare. These studies are based upon the probable maximum diversion which it is estimated would have taken place under the conditions affecting the traffic.

The fare increase here proposed is 25 percent, as compared with 66⅔ percent, or from 6 to 10 cents, at the time of the original report. On the basis of an assumption made in that report, that an increase to 8 cents would result in a diversion to other transportation facilities of 15 percent of its traffic, we estimated that respondent would earn an annual net income available for bond interest of about $2,260,817. This amount was approximately $541,000 less than the amount which we found would be necessary to meet increased operating expenses, increased taxes, and current interest on the railroad portion of the outstanding bonds. As will later appear, the assumption of a 15 percent diversion approximates that which actually occurred, but as stated, since then operating expenses and taxes have substantially increased beyond those anticipated at that time.

Respondent would not commit itself to any particular percentage of probable traffic diversion under the proposed fare. However, judging from the effects of the increase from [fol. 514] 6 to 8 cents in 1938 and the traffic increase in the first 8 months of 1942, certain deductions were made based upon an analysis of the factors which have affected its traffic. The actual diversion of passengers resulting from the increase from 6 to 8 cents, according to respondent, approximated 16.5 percent. Its total traffic for the first 8 months of 1942, the latest period for which the details were available at the time of the further hearing, increased 9.7 percent over the same period of 1941. That increase becomes 10.8 percent if the month of April 1942, during the last five days of which traffic was disrupted by derailment at Exchange Place station, be excluded. Excluding April, respondent's local downtown traffic for the same period increased 6.3 percent, and its joint-service downtown traffic, 34.1 percent. As stated, the total number of passengers carried by respondent in 1941 was 15.57 percent less than

in 1937. Based upon the foregoing experiences, and in the light of present economic conditions, a witness for respondent estimated that an increase in the fare from 8 to 10 cents would result in a diversion of not more than 12 percent of the 1941 traffic, and in view of the nature of the recent increase in traffic he inclined to a percentage decrease less than 12 percent, with a possibility that the volume diverted might be offset entirely by new traffic. Two factors which tended to increase the percentage of diversion when the downtown fare was increased from 6 to 8 cents have been eliminated. One was the possibility of direct bus service between metropolitan New Jersey and downtown Manhattan in competition with respondent's downtown line, mentioned in the prior report. We denied applications for certificates to inaugurate such service in *New Jersey-New York Bus Applications*, 23 M. C. C. 219. The other factor is the substantial curtailment of private car competition due to war conditions.

At the oral argument counsel for respondent stated, without objection, that for the year 1942 the increase over 1941 was 11.2 percent in the total number of passengers carried, 10.4 percent in operating revenue, and 33.7 percent in net income available for bond interest; and by stipulation it was there made to appear that in January and February 1943 the number of passengers further increased over the corresponding months of 1942 by 14.6 and 19.1 percent, respectively, thus reflecting an increase over January and February 1941 of 23.5 and 29.2 percent, respectively, and for the 2 months combined of 26.2 percent.

Protestants' testimony is composed largely of an attempt to fathom the effect which the proposed increase might have upon respondent's revenues. One witness estimated that under a 10-cent fare respondent would either lose net revenue by diversion to competing forms of transportation or the relatively small gain in net revenue would be so disproportionate to the gross revenue that the 2-cent fare increase would impose an undue burden upon respondent's patrons.

They estimate that the proposed fare would cause a minimum diversion of 25 percent of 1941 normal downtown traffic, or of 7,931,693 passengers. This estimate is predicated upon the results experienced under the increase from 6 to 8 cents in 1938, and particularly upon the availa-

bility of lower fares by competing lines. The lowest of the fares of New Jersey transportation companies operating to and from respondent's stations in New Jersey is 5 cents, and that fare used in conjunction with respondent's present 8-cent fare results in 13 cents one way or 26 cents round trip. Every point in the 26-cent Hudson County area can be served to and from New York by transportation agencies offering service at a total round-trip cost of 20 cents, and that fact is said to have had no small part in the decline of respondent's patronage. If the 10-cent fare should become effective, those passengers who live within walking distance of respondent's stations would not longer find the low-cost service to be over its downtown line, for they would have available to them busses to ferries at bus-ferry costs no higher than those of respondent's total [fol. 515] charge, namely, 5 cents bus fare and 5 cents ferry charge. Where such persons availed themselves of multiple-trip tickets offered by ferries their costs would be still lower. Multiple-trip tickets for use on the Lackawanna's ferry service average 2.9 or 3 cents per ride, so that passengers using that service have available to them through transportation to New York at a total of 7.9 or 8 cents per trip, composed of 5 cents by bus and 2.9 or 3 cents by ferry. In 1941, 16,243,490 passengers used the facilities of the Lackawanna ferry service to New York at no greater cost than to the New Jersey terminals of that road, the price of the tickets being the same to both sides of the river. It is stated that, inasmuch as a substantial number of people who use the service of the Lackawanna now transfer at Hoboken to the facilities of respondent and pay an 8-cent fare to downtown New York, an increase in the latter fare to 10 cents would discourage patronage of respondent's line. Protestants state that the foregoing applies with equal force to patrons of the Erie, which in 1941 transported 12,408,370 passengers in a corresponding service.

They emphasize that passengers arriving at Exchange Place station by foot, bus, or trolley car would have the choice of using respondent's 10-cent facilities to downtown New York or the Pennsylvania Railroad ferry at 5 cents. Also, an increase in the downtown fare to 10 cents for passengers who now use connecting-line bus service to respondent's stations would make more attractive the steam railroad commutation fares, which have already absorbed a substantial portion of the traffic diverted from

respondent. With the resulting greater differences between such fares and those by way of respondent's downtown line, protestants contend that residents of Jersey City would become "fare conscious," and there would be a tendency for such passengers to move to suburbs served by steam railroads. Under the 10-cent fare it is urged that the necessity would become greater for Jersey City and other municipalities to accede to the demands of the public to reroute bus facilities to the ferries so as to make available the lower transportation costs to and from New York. Any increase in fare between Hudson County and New York would injure industries which have located at Jersey City and other nearby points, and adversely affect the development of additional industries in that area. They surmise that should respondent increase its downtown fare, bus-ferry service might be established at a somewhat lower cost with equally as prompt service, and traffic might be diverted from respondent in consequence of this substituted service. They point out that, should respondent lose more than 20 percent of its downtown passengers under the proposed fare, its revenue would be less than under the present fare.

Protestants advocate the establishment by respondent of certain monthly commutation fares to take the place of the present 8-cent downtown and 10-cent uptown fares. Based upon the use of such fares and upon alleged past and present trends, they estimate that respondent's patronage might be expected to increase from about 66,000,000 passengers in 1941 to about 96,350,000 in 1943, or by 46 percent. Detailed figures are set forth, indicating that under this estimate a gross revenue of $7,263,900 might be expected in 1943, which would exceed by $1,801,900 the gross revenue in 1941. To reach these results protestants estimate, for 1943, 20,000,000 downtown joint-service passengers to and from the Pennsylvania at a divisional revenue of 7.64 cents, 6,000,000 uptown joint-service passengers to and from the Pennsylvania at a divisional revenue of 8.64 cents, 1,500,000 Pennsylvania Exchange Place passengers, 350,000 New York intrastate passengers and 3,500,000 New Jersey intrastate passengers at 5 cents, 20,000,000 uptown local passengers at an average fare of 9 cents,[3] and 45,000,000 down-

[3] These average fares are arrived at by the use of the suggested commutation fares.

town local passengers at an average fare of 7 cents.[3] The estimated gross revenue under such a patronage would result in $443,251.68 more than necessary to meet the estimated increased costs and all of the allocable bond interest for 1943.

[fol. 516] Protestants urge that the increase from 6 to 8 cents imposed an additional revenue burden on local passengers out of all proportion to the revenue gains to respondent. Thus, for 3.5-year period July 26, 1938, to December 31, 1941, the 8-cent fare produced revenue in excess of that which would have been realized at the 6-cent fare of $327,292, but required the decreased passenger traffic to pay an additional amount of $2,244,225. Respondent's railway operating expenses in 1941 increased over 1937 by $204,936, and taxes by $71,825, or a total increase of $276,761. The added cost to the 1941 downtown passengers as a result of the 2-cent fare increase aggregated $634,535, or $357,774 more than the total system increase in operating costs and taxes.

Moreover, protestants state that some of the uptown traffic has been lost by reason of the 8-cent fare, which has had a tendency to offset the gains from that fare on the downtown traffic. The revenue gain over 1937 from local traffic on the downtown line was only $33,132 in 1940 and $22,941 in 1941. During those years the local uptown traffic aggregated approximately 1.5 million passengers less than in 1937. Accordingly, protestants argue that to completely offset the 1940 and 1941 revenue gains it is only necessary to regard 330,000 uptown passengers out of the total decline of 1,5 million as having been collaterally affected by the diversion resulting from the 8-cent fare. Similar results are predicted if the latter fare is increased by another 2 cents.

It is contended by protestant that to charge the same fare of 10 cents on the downtown line as on the uptown line would be unduly prejudicial to downtown passengers and unduly preferential of uptown passengers. In support of this contention they point out that the Hudson Terminal is 1.25 miles from Exchange Place, 1.79 miles from Grove and Henderson Streets, 3.20 miles from Journal Square, 2.08 miles from the Erie station, and 2.96 miles from Hoboken, an average of 2.26 miles, whereas the distances between Thirty-third Street on the uptown line and New Jersey stations average 4.24 miles and reflect a minimum of 3.43 miles and a maximum of 5.71 miles. The average scheduled running time on the downtown line is 6.4 minutes as against

16.2 minutes on the uptown line. The daily average number of passengers per car is about 39.3 downtown and 24.2 uptown. In the original report, page 754, we observed that—

> From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than 10 cents.

Protestants repeat their charge, referred to in the prior report, of inefficiency of respondent's management in failing sufficiently to advertise its service and to meet competitive forms of transportation or to cooperate with other transportation companies for the purpose of augmenting its traffic. They are particularly insistent that the downtown local traffic should not be burdened with the entire revenue increase sought by respondent in order to meet the interest on its bonds, and that respondent should be expected to seek any increased revenue which it may need from the traffic interchanged with the Pennsylvania in accord with the following admonition embodied in the prior report, page 762:

> If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic.

The interline traffic there referred to is that interchanged with the Pennsylvania both at Exchange Place and at Journal Square, Jersey City, the latter in the joint rapid transit service in connection with the Pen-sylvania to and from Newark and intermediate points. The number of passengers interchanged at Exchange Place has remained fairly constant for a number of years and in 1941 was 1,393,734, all of which were transported for the Pennsylvania by respondent to and from downtown Manhattan at a division [fol. 517] of 5 cents per passenger agreed upon between the carriers in 1903. This service requires two terminal services by respondent, the same as on local traffic. As to this devision we said in the prior report, pages 755 and 756:

> Thus, such Pennsylvania Railroad passengers entering New York can reach Hudson Terminal at a lower rate of fare than can the Erie or Lackawanna

passengers and the division paid for such trans-Hudson service by the Pennsylvania is only one-half of the local fare herein proposed for such service, even though the great volume of the local traffic moves during the peak periods and undoubtedly with much less comfort and convenience to the passenger than is true of many, if not most, of the trunk-line passengers transferred at Exchange Place, a large proportion of whom travel at other than peak periods. Moreover, out of the revenue accruing to respondent from the 5-cent division, respondent pays back to the Pennsylvania 46 per cent thereof for easements granted by the latter for subsurface rights at Exchange Place. In 1937, that payment amounted to $30,964.

The joint rapid transit passengers of the Pennsylvania are transported by respondent to and from Journal Square for a division of 7.64 cents when to or from Hudson Terminal and 8.64 cents when to or from stations on the uptown line, including that at Thirty-third Street, where the Pennsylvania Terminal is located. In 1941 the number of passengers interchanged in this rapid transit service was 14,261,573, an increase of 7.2 per cent over 1940, and a decrease of 5.2 per cent under 1937. Of that number 11,354,062 were downtown and 2,907,511 uptown patrons. As a result of the war, the traffic in this joint service has increased steadily and much more rapidly than that in any other service of respondent, so that in August, 1942, it was greater by 41 per cent downtown and 15.1 per cent uptown than in the same month of 1941.

Respondent's reasons for its reluctance to pursue the course suggested in the foregoing quotation from page 762 of the prior report may be summed up as follows: When the contract between respondent and the Pennsylvania with respect to this joint service was revised in 1932, the Pennsylvania agreed to expend large sums for a new terminal at Newark, new bridges, and other improvements, including important changes at Journal Square station, so that the divisions of the joint fares received by respondent do not represent the entire consideration. That contract provides for modifications up or down in the divisions so as to reflect changes in the joint fares occurring after August 31, 1932, although, according to respondent, this does not necessarily contemplate changes in divisions to reflect every

change in the fare, since the divisions as fixed were based to some extent upon the average fare or fares in the joint service. On June 1, 1936, as a part of the general reduction in basic passenger fares from 3.6 to 2 cents in coaches, the one-way fare between Newark and New York was reduced from 33 cents to 20 cents, and although since then that fare has not risen above 24 cents and is now 22 cents, the Pennsylvania has made no demand that respondent accept a reduced division of that fare. Also, when the downtown fare of respondent was increased from 6 to 8 cents in 1938, the Pennsylvania sought no part of such increase in the form of increased divisions from the joint rapid transit fares.

While, as stated, the one-way fare between Newark and New York was reduced from 33 to 20 cents on June 1, 1936, the round-trip fare remained unchanged at 40 cents from March 1, 1920, to July 25, 1938, when it was increased to 48 cents. On September 1, 1938, it was reduced to 44 cents, on March 25, 1940, to 40 cents, and the general increase of February 10, 1942, made it 44 cents, which is the present fare. The great bulk of the rapid transit traffic moves at the round-trip, and not the one-way fares. No effort has been made by respondent to obtain the consent of the Pennsylvania to increased divisions of the round-trip fares, in accord with the provision of the contract above referred to, [fol. 518] the reason given being that common business ethics, aside from any consideration of the practical questions involved, precluded any such efforts on its part. Respondent takes the position that it is "wholly impractical" to seek greater divisions of the joint fares, at least so long as its downtown fare remains at 8 cents. Under the latter fare it performs two terminal services, whereas under the joint fares it performs only one terminal service. That fact, respondent believes, might militate against the Pennsylvania agreeing to an increase in the present downtown division of 7.64 cents. However, if the downtown fare were increased to 10 cents, respondent would then regard itself as in a better position to seek an increase in the downtown division, at least to 8.64 cents, the same as on the uptown line.

Respondent's present divisions from the rapid transit service have remained unchanged since September 1, 1923. For many years the downtown division of 7.64 cents ex-

ceeded the downtown local fare of 6 cents by 1.64 cents, but since July 24, 1938, the local fare has been higher than the division. The distance from Hudson Terminal to Market Street, Newark, is 8.89 miles, of which 36 per cent is over the line of respondent. The division of 7.64 cents is only 34.7 per cent of the present joint fares. For respondent's service from Journal Square to Hudson Terminal, 3.20 miles, it receives 2.39 cents per mile from the Pennsylvania, but to Hudson Terminal from the Erie station, 2.08 miles, and from the Lackawanna station, 2.96 miles, the Erie and Lackawanna passengers must pay the full local fare, averaging, respectively, 3.85 and 2.70 cents per mile under the present fare, and 4.81 and 3.38 cents per mile under that proposed. If no more than the 10 per cent increase as made in the joint fares were reflected in the divisions to respondent, its revenues would be increased by about $150,000 a year.

Of the trunk-line railroads reaching the Jersey shore, the Pennsylvania is the only one having joint-line arrangements with any railroad serving Manhattan, and respondent and the Pennsylvania have the only two trans-Hudson tunnels available for rail traffic. Other important benefits derived by the Pennsylvania from its joint arrangements with respondent are sufficiently detailed on page 756 of the prior report.

The Price Administrator offered no evidence, but on brief filed in behalf of the Director of Economic Stabilization he takes the position that respondent's revenues under its present 8-cent fare, judging from net income for the first 8 months of 1942, will exceed by 24.6 per cent those for the same period of 1941, and that this estimated increase in net income would virtually be the equivalent of that contemplated by us at the time of our former report. He further estimates that should respondent retain its present volume of traffic at present fares, the net income available for interest at the end of 1942 would approximate $1,976,324, which would be only $564,728 less than the total interest requirements for the bonds outstanding as of August 31, 1942, including 5 per cent on the adjustment income bonds, and asserts that this estimate includes full allowance for the increased operating expenses and taxes claimed by respondent. The amount available for the adjustment income bonds under such calculations would be equivalent to interest thereon at the rate of 2.601 per cent. The figures from which these conclusions are reached were ascertained

by dividing by 8 the actual net income of $1,317,549 available for bond interest in the first 8 months of 1942 and multiplying the result by 12. The resulting figures for the last 4 months of 1942 do not reflect such factors as increased labor costs actually incurred, and special operating expenses occasioned by the war. Respondent points out that if the portion of the increased labor costs on an annual basis omitted in the foregoing analysis, namely, $196,700, plus the omitted annual war contingency reserve of $240,000, be deducted from the annual net income available for bond [fol. 519] interest of $1,976,324 as calculated by the Price Administrator, the result, $1,539,624, would be $1,001,428 less than the total interest requirements of respondent on bonds outstanding on August 31, 1942, instead of $564,728 as represented by the Price Administrator. As will later appear, neither of these results accords appropriate consideration to the accelerated increase in the number of passengers carried and the railroad operating revenue on the lines of respondent in June, July, and August, 1942, and in January and February, 1943, the latest months for which the results are of record.

The Price Administrator argues, in substance, that to seriously measure respondent's financial condition by whether it is able to earn sufficient to pay interest on its outstanding obligations assumes a false premise; that respondent, as a matter of right, is not entitled to earn full interest on all of its bonds; that interest on the adjustment income bonds is not bond interest in its usual meaning; that these income bonds are wholly different from the outstanding first mortgage and first lien and refunding bonds; and that while it is true that interest on the income bonds is cumulative, the payment of the accrued interest is a contingent liability. The interest on these income bonds is to be paid annually only if and when earned. However, the bonds and the accumulated interest become payable February 1, 1957, at which time both the bonds and the accumulated interest, if any, will become a fixed liability enforceable by foreclosure.

The Emergency Price Control Act of 1942, as amended by the Stabilization Act of October 2, 1942, is designed in general to prevent inflation or increased living costs. It provides, however, that nothing in that act shall be construed to authorize regulation of rates charged by any com-

mon carrier or other public utility. An executive order of the President, dated April 8, 1943, reads in part as follows:

> The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.

The Price Administrator urges that successful control of threatened increases in rates is now wholly dependent upon agencies such as the Commission, and that it is our primary responsibility to prevent inflationary rates and charges in this field, and to forestall unnecessary increases in the cost of living which would result from higher rates and charges. The proposed increase, when coupled with other increases in the cost of living, he maintains, would "commence the rise of that spiral which, if not arrested, must lead" to inflation. He takes the position that any increase in rates or fares, unless clearly shown to be necessary to preserve existing facilities under current conditions, would be in conflict with the Administration's price control program, and that since the increase here proposed would have a substantial bearing upon the cost of living in the communities served by respondent, it would be contrary to the Stabilization Act and should be condemned.

Respondent urges that an increase of 2 cents in the downtown fare could neither result, nor substantially tend to result, in inflation or increased living costs within the purview of the Emergency Price Control Act; that any conceivable tendency toward either inflation or increased living costs would be so negligible that it must be deemed not to be within the concern of that act; and, moreover, that an increase in passenger fares, unlike an increase in freight rates, would ordinarily tend toward deflation rather than inflation, as the initial effect of such increase would be to divert money and, therefore, purchasing power from the commodity market. The proposed increase of 2 cents

[fol. 520] for a single ride and 4 cents for the round trip would result in a maximum additional cost of about $1.04 per month and $12.48 per year to daily passengers making round-trip use of respondent's line six days every week. This maximum would apply, in general, only to the peak-hour passengers who use the downtown line daily, and who comprise less than 45 percent of the passengers using this line.

Major findings and conclusions. Increased expenses, of course, do not necessarily warrant increased fares or rates, for a sufficient rise in the traffic volume may produce the same, or even greater, net revenue than before such increased expenses were incurred. Respondent's annual operating costs have increased since 1937 by about $671,500 and since 1941 by about $466,500, including the war contingency reserve of $240,000 a year for protection against extraordinary war hazards, which we may accept as reasonable, even though none of it had been used at the time of the further hearing, or more than 9 months after the entrance of this country into the war, and only $20,000 thereof (used to defray the portion not covered by insurance of the expenses occasioned by the derailment at Exchange Place in April, 1942, previously referred to) had been used at the time of the oral argument in April, 1943. Taking into account those increased operating costs, together with the augmented traffic and revenues since the beginning of the war, we must next determine the probable future revenue results on respondent's lines under the present and the proposed fares.

In the first eight months of 1942, as stated, respondent's total traffic increased 9.7 percent over the same period of 1941. At the same time its railroad operating revenues increased 9 percent, and net income available for interest on bonds allocable to railroad properties increased 24.63 percent. However, these results include increased labor costs effective July 1, 1942, for only two months, and do not include any of the additional costs incident to the special protection needed to safeguard the property against war hazards. But even of those omissions be taken into account, the result may not be accepted as indicative of what may be expected in a typical war year. This becomes apparent upon noting that in the respective months of 1942 the number of passengers carried by respondent increased over the corresponding months of 1941 by 7.8 percent in January,

8.5 percent in February, 8.6 percent in March, 6.8 percent in May, 12.6 percent in June, 16.3 percent in July, and 15.9 percent (estimated) in August. In the latter month the railroad operating revenue increased 15.62 percent, and net income available for interest on the railroad portion of the bonds increased 23.55 percent.

As stated, in the year 1942 the number of passengers carried increased 11.2 percent and the net income available for bond interest 33.7; and in January and February, 1943, the number of passengers increased over the corresponding months of 1941 by 23.5 and 29.2 percent, respectively, or a combined increase of 26.2 percent. Judging by what occurred in 1942, the increase in the operating revenue in January and February, 1943, was probably slightly below the increase in traffic. No reason appears, however, for assuming that the increase over 1941 in revenue from passenger fares in any future war year will be less than about 23 percent, and we may regard such an assumption as reasonable. Based upon a probable annual revenue from passenger fares of $6,718,086, which is 123 percent of that in 1941, and upon total operating expenses on the 1941 basis at such a traffic level of $3,476,047, as estimated by respondent, plus the increased labor costs since 1941 of $226,500, the war contingency reserve of $240,000, and increased taxes (based on the percentage increase in August, 1942 over August, 1941) of $60,130, together with a combined net charge on the 1941 basis of $533,949 for all other operating items and taxes, as estimated by respondent, we arrive at a probable annual net income available for interest on the bonds allocable to the railroad properties of $2,181,460. Deducting the annual interest of $1,363,906 on the first two [fol. 521] bond issues would thus leave about $817,554 for payment on the adjustment income bonds, equivalent to interest thereon at the rate of 3.473 percent. In the prior report, as stated, we estimated a net income in future years of about $2,260,817.

Economic and competitive conditions affecting respondent's traffic have, of course, changed materially since the prior decision, and a downtown fare of more than 8 cents would not now have as serious an effect in traffic diversion as would have been true in 1938. So long as the present abnormal conditions by reason of the war continue, it seems clear that a downtown fare of 10 cents, as proposed, would yield to respondent substantial additional net revenue. In

June, July, and August, 1942, the latest months for which the details are of record, the percentage increase in the number of local passengers on the downtown line as compared with the corresponding months of 1941 was 55.1 percent of the contemporaneous increase in respondent's total traffic. We may assume that the same ratio will hold true in future war periods. The increase over 1941 in the downtown traffic and revenue will thus be about 12.67 percent. Assuming such an increase in the number of downtown local passengers by reason of the war and, as does respondent, a 12 percent diversion in the 1941 downtown traffic under a 10-cent fare, and allowing for reduced out-of-pocket expense, on the basis employed by respondent, by reason of the smaller traffic volume than under an 8-cent fare, the resulting net income available for bond interest under a fare of 10 cents would approximate $2,564,144. After payment of the interest on the first two bond issues, the remainder would be $1,200,238, or $23,090 more than necessary to meet the full 5 percent interest on the income bonds. Moreover, if respondent's estimate of a 16.5 percent diversion by reason of the 2-cent fare increase in 1938 be accepted as approximately the actual, it is at least doubtful whether a diversion of as much as 12 percent should be anticipated following a like fare increase made under present conditions.

What has just been said makes it advisable to approximate the revenue results which may be expected if the downtown fare were made 9 cents. Assuming an increase in the 1941 downtown local traffic due to the war of 12.67 percent, a 5 percent diversion by reason of a 1-cent increase in the fare, and making due allowance for the reduced out-of-pocket expense because of such diversion, the resulting net income available for bond interest would approximate $2,404,502. After payment of the interest on the first two bond issues, this would leave for application on the income bonds $1,040,596, or at the rate of 4.420 percent.

The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest on its bonds. This it should be permitted to do if it can be done without casting an undue burden upon any particular traffic. The increased operating expenses, being general in nature, should be borne, where practicable, by the entire traffic of the railroad. Accepting as a fact respondent's statement that no additional revenue

of any consequence could be expected from an increase in its fares other than that on the downtown line, it becomes important to observe that, while respondent's railway operating expenses and taxes in 1941 were greater by $276,761 than in 1937, the latest year of record at the time of the prior decision, its revenue from the traffic interchanged with the Pennsylvania was $68,527 less in 1941 than in 1937. Revenue from the downtown local traffic, on the other hand, increased in that period by $22,941. Bearing in mind that this modest increase was achieved at an increased fare of 2 cents, and under general economic conditions in the two years which may be said to have been fairly comparable, it would seem that under normal circumstances the saturation point in increased fares on that traffic has about been reached. While there can be little doubt that under present conditions a further increase in this fare, even to 10 cents, would result in additional net revenue, we are convinced [fol. 522] that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic. This view is strengthened by the fact that in August, 1942, for example, the interline traffic increased 33.1 percent, as compared with an increase of only 9 percent in the downtown local traffic and of 15.9 percent in respondent's total traffic.

Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an 8-cent or a 9-cent fare than for a 10-cent fare on the downtown line of respondent. As stated, if respondent had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942, supra*, the downtown fare would now be 9 cents. An increase to that amount would be consistent with that decision, for respondent has been affected by the same conditions making for higher operating expenses which we took into account in authorizing a general increase in railroad passenger fares.

It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a

factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

Based upon the foregoing facts, we find that in order to meet increased operating expenses and the interest on its bonds, respondent is in need of additional revenue beyond that which may be expected from its present fares and divisions, and that a portion of such additional revenue can reasonably, and should, be obtained by increasing its downtown fare from 8 to 9 cents.

Increases in rates or fares based upon abnormal conditions of a transitory nature should not be made permanent. The greater portion of respondent's increased operating costs, namely, the war contingency reserve of $240,000 per year, is wholly attributable to a condition which may be expected to be eliminated after the war, and that amount is greater than the additional revenue which may be anticipated from the increased fare herein approved. Accordingly, the increased fare should remain in effect for no longer than the duration of the war and six months thereafter. It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing.

We affirm our original conclusion herein, that the proposed fare of 10 cents would be unjust and unreasonable, and has not been justified. We further conclude that an increased local fare of 9 cents on respondent's downtown line has been justified, for application during the remaining period of the war and six months after its termination. Our prior conclusion and order, to the extent that they are in conflict herewith, are hereby modified accordingly. No order is necessary.

MILLER, Commissioner, concurring in part:

I concur in the finding of the majority insofar as it gives approval to increasing the present fare to 9 cents. In my

dissent to the prior report, 227 I. C. C. 741, I expressed the view that the record there amply justified a finding that the proposed fare of 10 cents would be reasonable and lawful [fol. 523] for the services performed by this respondent. Nothing is presented as a result of the further hearing to cause me to change that opinion.

Moreover, I see no sufficient reason for here limiting the time during which the 9-cent fare shall remain in effect.

I am authorized to state that Commissioners Mahaffie and Patterson join in this expression.

Commissioners Aitchison did not participate in the disposition of this proceeding.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 524] PLAINTIFF'S EXHIBIT "3"

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4394

Passenger Fares of Hudson & Manhattan Railroad Company

Submitted October 14, 1943. Decided November 2, 1943

1. Passenger fare on an alternative basis of 11 tokens for $1 or of one dime in cash, for local interstate application on the downtown line of the Hudson & Manhattan Railroad Company, found reasonable and otherwise lawful for the remaining period of the war and 6 months thereafter, upon condition that the same alternative basis be maintained on the uptown line. Conclusions in report on reconsideration affirmed. Prior reports, 227 I. C. C. 741, 255 I. C. C. 649, 256 I. C. C.

2. Motion for further reopening of proceeding overruled.

Appearances shown in the first report on further hearing.

Second Report of the Commission on Further Hearing

PORTER, *Commissioner:*

In the first report herein, 227 I. C. C. 741, we found on July 11, 1938, that a proposed fare of 10 cents for local

application on the downtown line of the Hudson & Manhattan Railroad Company, hereinafter called respondent, had not been justified, but that a fare of 8 cents had been justified. The latter fare became effective July 25, 1938, and is still maintained. Respondent was not satisfied with that decision and appealed it to the courts, wherein our action was sustained. *Hudson & Manhattan R. Co.* v. *United States*, 33 Fed. Supp. 495; affirmed, 313 U. S. 98.

Upon petition of respondent dated July 27, 1942, reciting that conditions had materially changed since the prior decision, we reopened the proceeding, held a further hearing, and on June 8, 1943, in a report on further hearing, hereinafter called the second report, 255 I. C. C. 649, we found reasonable and otherwise lawful a fare of 9 cents, for application during the remaining period of the war and 6 months thereafter, and modified the prior findings accordingly.

On July 8, 1943, respondent represented by petition that collection of a 9-cent fare as authorized was impracticable and asked for modification of our findings in the second report, first, by authorizing an alternative-fare basis of 11 tokens for $1 or a cash fare of one dime, conditioned upon the establishment and maintenance of the same alternative fare basis, in lieu of the present 10-cent cash fare, for local application on respondent's uptown line; second, by authorizing a 10-cent cash fare for all local downtown traffic until the necessary strategic materials could be secured, the tokens manufactured, and the alternative-fare basis put into use; and third, by eliminating the limitation attached to our authority whereby the 9-cent fare was approved for application only until 6 months after the termination of the war. Embodied in this petition were certain sworn statements of fact upon which the prayers made were grounded. Protestants, namely, Jersey City and other municipalities [fol. 525] of Hudson County, N. J., certain bus companies reaching respondent's New Jersey stations, and the Director of Price Administration for himself and the Director of Economic Stabilization, replied to this petition, requesting denial, more particularly of the second and third prayers embodied therein, as referred to above, or that the proceedings be set for further hearing.

On August 3, 1943, we reopened the proceeding for reconsideration and on the same date adopted a report on reconsideration, hereinafter called the third report, 256

I. C. C. —, wherein we denied the requests for authority to charge a 10-cent fare during the interim period prior to the use of tokens and for elimination of the limitation of our approval of the 9-cent fare to the period ending 6 months after the termination of the war, and modified the prior findings by authorizing, in lieu of a 9-cent cash fare on the downtown line, an alternative fare basis of 11 tokens for $1 or a cash fare of one dime, upon the condition that the same alternative-fare basis be established and maintained for local application on the uptown line. This modification of the prior findings was based upon our conviction, as expressed in the third report, that we had failed in our second report to give to certain evidence of record with respect to the feasibility of collecting a cash fare of 9 cents the weight to which it is entitled, and upon specific findings (1) that the collection of a 9-cent fare, either in cash or by strip or commutation tickets, was impracticable, and (2) that the alternative-fare basis as proposed was practicable, would result in probable net railway operating revenue at least no greater than under the basis contemplated by our findings in the second report, and had been justified as reasonable and otherwise lawful.

On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been "deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *." Accordingly, out of an abundance of caution, by order of September 18, 1943, we reopened this proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto * * * the right to cross-examine adverse witnesses." Such further hearing has been held, and upon the filing of briefs the matter has been submitted for our further decision.

At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Adminis-

trator's brief was accompanied by a motion, filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding "for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942," called the Stabilization Act. To this motion respondent replied. Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted. [fol. 526] In the complaint of the City of Jersey City before the District Court no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to 9-1/11 cents.

"At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled."

Findings of Fact

Upon the amplified record now before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.*

Under peak-traffic conditions passengers pass fare-collection boxes on every business day at a rate as high as 3 per second and frequently average, over 3-minute periods, from 55 to 60 per minute. An average of about 25,000 passengers pass these boxes at Hudson Terminal during the rush hours both morning and evening. The present fare-collection boxes were designed to receive and count a maximum fare of 7 cents, at a time when the uptown fare was 7 cents and the downtown fare was 5 cents. Since the establishment of the present 8-cent fare, because of the increased number of coins being used, respondent has experienced frequent jamming of the fare boxes. A 9-cent cash fare would require the use of one more coin per passenger than does the 8-cent fare. The manner of construction and operation of respondent's fare boxes is recited in detail in the third report and will not here be repeated.

From an actual demonstration of the operation of the fare boxes made at the further hearing, and from the testimony of the president and the general superintendent of respondent, and by a representative of the manufacturer of these boxes, it is plain that any attempt to collect a 9-cent cash fare with respondent's present fare boxes would result in the counting mechanism of many, if not most, of the boxes becoming jammed during the rush-hour periods (approximately 2 hours in the morning and 2 hours in the evening) within less than 2 minutes. When a fare box becomes jammed it requires from 10 to 30 minutes to clear and restore it to service, provided a mechanic is immediately available. Respondent has only a small number of extra fare boxes for use as substitutes when any of the regular boxes become clogged, and an additional supply can not now be obtained because of priority restrictions. It has only three mechanics capable of restoring jammed boxes to use, and additional mechanics are difficult, if not impossible, to obtain. There is no way in which the mechanism in the present boxes can be altered so as to make

practicable the collection and counting of a 9-cent cash fare, and there is no existing fare box which will collect and count [fol. 527] such a fare under the mass transportation conditions presented by respondent's operations. The cumulative stoppages of fare boxes with the use of such a fare would result in serious inconvenience and delay to passengers, for it would require waiting trains, which during peak traffic periods must operate on a 3-minute schedule, with a 90-second headway through the tunnels, to depart only partially filled, while succeeding trains would be inadequate to accommodate the accumulated traffic.

The counting mechanism of these boxes is indispensable to the efficient operation of respondent's railroad, first, so as to provide a check on the efficiency of the fare-box attendant in observing the deposit of the fares; second, to provide a check against the subsequent count of the fares in respondent's coin-counting room; third, to prevent the necessity of an impracticable guarding of the sealed coin-collection cans between the time they are removed from the fare boxes and the time they are received in the counting room; and fourth, to provide the railroad with the traffic check necessary to control its train schedules and service by determining the volume of the incoming traffic during typical periods and thus make available the data essential to the control of train operations.

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.*

Other methods of collecting a fare of 9 cents considered and rejected by respondent were the following: (a) By requiring the passenger to deposit initially a dime and to receive a contemporaneous refund of 1 cent from the fare-box attendant. The attendant, at least during the peak-traffic periods, could not watch the coins drop into the fare box and at the same time make change. Such attendants, the number of which would have to be at least doubled, would have to be furnished with about 125,000 pennies each business day. The attendants could not be certain that the penny refund would not be made to the uptown as well as the downtown passengers.

(b) By the use of weekly or monthly passes or commutation tickets. Such passes or tickets could not be policed

during the rush hours, and their attempted inspection by station attendants would entail too much delay to passengers.

(c) By the use of single-trip or multiple-trip tickets. The fare boxes are not adapted to effect the necessary cancellation of such tickets, and cancellation machinery cannot be obtained under the present war conditions. Other rapid-transit companies in the New York area have abandoned the use of such tickets because there are means by which cancellations can be eradicated and the tickets reused, such strips as deposited by groups of passengers may be abstracted from the box by the attendant, and when tickets are sold in strips they may be torn short by the purchaser so as to provide more tickets than were sold. Moreover, the sale of single tickets, with the necessity for making change, would result in serious congestion and delays to passengers during the peak-traffic periods.

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.*

The reasons why this is so are fully and accurately set forth in our third report, and repetition here would serve no useful purpose.

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation service.*

[fol. 528] The alternative-fare basis is practicable in that it can be used conveniently both by the public and by respondent if made applicable contemporaneously, as proposed, on both the downtown and uptown lines. Such tokens will be available for use either by the purchaser, by any member of his family, or by others, and without limitation as to the period in which they may be used.

The sale of tokens in lots of 11 for $1 will result in an average fare of 9-1/11 cents, or approximately the same as we approved in the second report. It will result in a fare reduction to passengers purchasing tokens and using the

uptown line from 10 cents to 9-1/11 cents, or 10/11 of a cent.

Based upon the number of local interstate passengers carried by respondent in the first 8 months of 1943, adjusted to a 12-month basis, and assuming a 5 percent loss in the downtown local passengers by reason of an increase in the fare, the proposed alternative basis can be expected to bring to respondent at least no greater gross or net revenue than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible, as contemplated by our findings in the second report. If such estimate were based upon a use ratio of 90 percent tokens and 10 percent dimes, as respondent claims it should be, the result would approximate $85,000 less annual revenue under the alternative basis than under the 10-cent and 9-cent cash fares.

This use ratio of 90 percent tokens and 10 percent dimes is challenged by protestants, especially by the Price Administrator. Its advocacy by respondent is grounded chiefly upon the experience on its lines that about 90 percent of its patrons are regular commuters. Protestants' challenge is grounded largely upon a report made in 1937 by a committee on fare structures to the American Transit Association, which was made a part of the record at the further hearing, and which shows the relative use of tokens and cash fares on the lines of 75 transit companies serving communities ranging in population from 20,000 to about 3,000,000, located in various sections of the United States and in 4 Canadian provinces. The illustrations given comprise 127 observations, made in the years 1921 to 1935, inclusive, embracing combinations of cash and token rates ranging, in differentials between such rates, from 2.83 to 37.5 percent, in token-investment requirements from 15 cents to $1.20, and in cash fares from 6 to 10 cents. The results thus revealed, even under the same combinations of cash and token rates, vary widely. For example, under a fare basis of 8 cents in cash and 4 tokens for 30 cents, a transit company in Wilmington, Del., showed a token use in 1931 of 65 percent, while the experience of a company in Wilmington, N. C., in 1929 was only 40 percent, that of one in Durham, N. C., in each of the years 1923 and 1927 was 52 percent, and that of another in Scranton, Pa., in 1928 and 1930 was 72 percent. So, also, the proportion using tokens under a basis of 7 cents in cash and 4 tokens for 25 cents on 10 different companies, in various years from 1921 to 1933, ranged from 62 percent

to 92 percent. The ratio of tokens used to the total fares on these companies was about the same for token payments ranging from 20 to 45 cents, beyond which the token percentage dropped noticeably until a payment of 55 cents was reached, after which up to about $1 the drop was relatively slight.

About all of any consequence here that this exhibit shows is (1) that two powerful forces which have bearing upon the token-cash use ratio are the differential between the token and cash-fares, and the amount of the token investment, and (2) that the smaller the differential and the greater the investment, the smaller will be the proportion of those using tokens. It is plain also that, generally speaking, the more infrequent the use made by the passenger of the company's services, the less likely he is to purchase tokens, especially if the token investment is relatively high. What the claimed proportion of the regular commuters on any of these transit companies may have been at the time the respective observa-[fol. 529] tions were made does not appear. The committee points out that the working class, which is generally the largest user of the service, tends to regard expenses in terms of weekly periods, because they are the most common "payday" intervals; nevertheless, it implies that where the token rate is high, the purchase of a half week's service at one time might be all that should be required. It regards the opportunities for experimentation as almost unlimited, and lists 195 combinations of cash and token rates, comprising token investments up to $1 and cash fares of from 6 to 10 cents. It sets forth what, in its opinion, would be the most probable average fare and the percentage of token use under such combinations. For example, under a cash fare of 10 cents and a token fare of 18 for $1, it would expect a token use of 86.77 percent, but if the number of tokens for $1 were reduced to 14, it would expect the token percentage to drop to 67.84, and if the number for that price were further reduced to 11, as in the instant proposal of respondent, the use ratio would be expected to recede to 33.76 percent. The committee admits, however, that deviations of actual results from those estimated might occur from various causes, and it adds this statement: "If the transit industry is to continue to build towards a rate structure which shall be at the same time economically sound and socially acceptable, it seems advisable for the industry to give more consideration than is evident from the various combinations of

cash and token rates now in effect, to the nature and strength of the forces that are introduced in the structure and the effects of these forces on patronage and revenue."

None of the 75 transit companies included in the foregoing report to the Transit Association operates in the New York area, nor did the observations made embrace any combination of 11 tokens for $1 and a cash fare of a dime. Moreover, there is no indication that the traffic characteristics of any of those companies are similar to those on the lines of respondent, particularly with respect to the volume of traffic and the concentration thereof in peak periods at particular stations, such as at Hudson Terminal. As indicated, the token ratio on the respective companies under the same fare combination varied as much as 32 percent. A "spot check" based on 1943 data, made on 9 of the 75 companies included in the foregoing exhibit, showed an average deviation from the results as reported in 1937 of 1.8 percent and a maximum deviation of 13.7 percent. If this maximum deviation (13.7 percent) as reported in 1943 be added to the foregoing maximum deviation under a particular fare combination (32 percent) as reported in 1937, the result is a permissible variation from the average as envisioned by the 1937 report of as much as 45.7 percent, which, added to the expectations of the Transit Association's committee under a fare basis of 11 tokens for $1 and a cash fare of 10 cents, namely, a token use ratio of 33.76 percent, brings the possible use ratio for tokens on the lines of respondent under the alternative fare basis here proposed, based on the Price Administrator's showing, to 79.46 percent. Even if the actual use ratio under the proposed basis should prove to be 70 percent tokens and 30 percent dimes, respondent's revenue would, within about $15,000, approximate that anticipated by our findings in the second report, based upon the number of local interstate passengers carried in the first 8 months of 1943, adjusted to a 12-month basis, and allowing for a 5 percent diversion by reason of the fare increase on the downtown line, but making no allowance for the increased number of passengers which could be expected to be drawn to the uptown line by reason of the fare reduction thereon. Moreover, as indicated, it is likely that the traffic characteristics on the lines of respondent differ greatly from those on the lines of the other companies referred to of record, and therefore the 90-10 percent use ratio urged by respondent

appears to us to be within the range of probable achievement under the proposed fare basis.

Protestants imply, but do not claim, that an investment of [fol. 530] $1 for the purchase of tokens is greater than warranted by the economic status of respondent's commuters. The price of the average monthly commutation fares in the New York metropolitan area is at least $5, and at the first hearing herein the New Jersey protestants advocated the sale by respondent of interstate 60-ride commutation fares at a price of $3. Respondent takes the position that there is no material difference between the financial status of its passengers and that of commutation passengers generally in the New York area. Protestants take a different view. The record would not support a finding that there is any such difference, but if such a difference should exist, plainly it may not be assumed, without more, that it is greater than that reflected between the $1 here proposed to be charged and either the $3 advocated by the New Jersey protestants or the more than $5 now charged on the average for commutation tickets by railroads generally in the New York area.

The only way, of course, in which the effect of the proposed fare basis, either upon the public in convenience of use or upon the respondent in revenue results, can be ascertained without the uncertainties necessarily inherent in predictions of traffic or revenue results, is by giving the basis a fair trial

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.*

In our second report, page 668, we found that a maximum increase of about 12 cents a week and 52 cents a month per passenger reflected by an increase from 8 to 9 cents in respondent's downtown fare, would not be in conflict with the Emergency Price Control Act of 1942, as amended. The difference between the 9-cent fare found to be lawful in that report and the average token fare of 9-1/11 cents now proposed is equivalent to a maximum increased transportation cost to the average downtown passenger of about 57 cents a year. On the other hand, the proposed reduction in the uptown fare from 10 cents to an average token fare of 9-1/11

cents is equivalent to a maximum decrease in transportation cost to the average uptown passenger of $5.67 a year. For respondent's local interstate passengers as a whole, the proposed basis will not result in any greater increase in average transportation cost per passenger than that contemplated by our findings in the second report.

Our views with respect to the effect of the provisions of the Emergency Price Control Act of 1942, as amended, upon our administration of the Interstate Commerce Act are set forth in *Increases in Taxes, Rates, Fares, and Charges*, 253 I.C.C. 723. See, also, *Increased Railway Rates, Fares, and Charges, 1942*, 255 I. C. C. 357, 392.

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.*

Under the proposed basis the occasional or irregular passenger will pay 10 cents on both of respondent's lines. In the second report we found that the fares and charges of record for commutation service of carriers other than respondent serving the New York metropolitan area afford stronger support, differences in transportation services considered, for an 8-cent or a 9-cent fare than for a 10-cent fare on respondent's downtown line. That finding, however, was based upon a comparison between fares and services for commutation passengers, and not for passengers who may ride only occasionally in commutation equipment. On the railroads generally, the latter passengers do not ride on commutation tickets, but on standard coach tickets, the price of which is subject to the minimum charge [fol. 531] of 10 cents for all passengers on rail passenger equipment prescribed by us in *Passenger Fares and Surcharges*, 214 I.C.C. 174, 257.

Conclusions

Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we affirm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 takens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for applica-

tion during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and maintenance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.

Respondent asks for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in section 6(3) of the act. A downtown fare of 9 cents was approved by us on June 8, 1943, and in the ordinary course, if collectible, that fare would now have been in effect for about 4 months. Accordingly, we feel warranted in exercising the powers given to us in section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice.

An order overruling the aforesaid motion of the Director of Economic Stabilization, and granting permission to respondent to establish the fares herein approved upon not less than 15 days' notice, will issue.

MILLER, *Commissioner*, concurring in part:

My views in this proceeding are set forth in the expressions made by me in connection with the prior reports. I here concur in the finding made respecting the alternative basis of fares insofar as it will afford relief from the conclusion reached by the majority in the report on further hearing, 255 I.C.C. 649.

I am authorized to state that Commissioners Mahaffie and Patterson join in this expression.

Commissioner Atchison did not participate in the disposition of this proceeding.

[fol. 532] Order

At a General Session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 2d day of November, A. D. 1943.

Investigation and Suspension Docket No. 4394

Passenger Fares of Hudson and Manhattan Railroad Company

This proceeding having been reopened for further hearing, and full investigation of the matters and things involved having been had, and the Commission having, on

the date hereof, made and filed a second report on further hearing containing its findings of fact and conclusions thereon, together with a discussion of the motion of the Price Administrator in behalf of the Economic Stabilization Director for further reopening of this proceeding, which said report is hereby referred to and made a part hereof:

It is ordered, That the aforesaid motion of the Director of Economic Stabilization, by the Price Administrator, be, and it is hereby, overruled.

It is further ordered, That the respondent, Hudson & Manhattan Railroad Company, be, and it is hereby, authorized to publish and apply the fares found in said report to be reasonable and otherwise lawful upon not less than 15 days' notice to the Commission and to the general public, in the manner provided in section 6 of the Interstate Commerce Act.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 533] Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties to this proceeding by mailing a copy thereof, with postage prepaid, to each party of record.

Dated at New York, New York, this 13th day of July, 1943.

S. S. Eisen, For Protestants.

[fol. 534] PLAINTIFF'S EXHIBIT "4"

22348

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 4398

PASSENGER FARES OF HUDSON & MANHATTAN RAILROAD COMPANY

Submitted June 22, 1938. Decided July 11, 1938

Proposed increased local passenger fare of the Hudson & Manhattan Railroad Company between Jersey City and Hoboken, N. J., and Hudson Terminal, New York, N. Y., found not justified. Suspended schedules required to be canceled, without prejudice to the establishment of a fare of 8 cents.

John F. Finerty, John E. Buck, Donald C. Swatland, and *Thomas A. Halleran* for respondent.

Milton P. Bauman, James A. Hamill, Charles Hershenstein, Michael J. Bruder, John N. Platoff, Nicholas S. Schloeder, Alfred Brenner, James C. Agnew, Horace L. Allen, James A. Coolahan, Theodore C. Baer, George F. Cassidy, Morris E. Barison, William Schlosser, Maurice Frager, Fred Eichman, L. Alfred Jenny, and *William Reger* for protestants.

William L. Bevan for Public Utilities Commission of New Jersey.

Charles J. Fagg, Thomas M. Kane, and *W. H. Chandler* for local interests.

REPORT OF THE COMMISSION

Porter, *Commissioner:*

Exceptions to the report proposed by the examiner were filed by respondent and protestants, and the issues were orally argued before us.

By schedules filed to become effective September 1, 1937, respondent Hudson & Manhattan Railroad Company proposed to increase from 6 cents to 10 cents its passenger fare between Hudson Terminal, New York, N. Y., and stations in Jersey City and Hoboken, N. J. Upon protest

of numerous commuters and of the municipalities of Jersey City, Hoboken, Bayonne, Harrison, Secaucus, North Bergen, and others in Hudson County, N. J., operation of the proposed schedule was suspended to April 1, 1938. The effective date has since been voluntarily postponed to September 1, 1938.

Respondent's lines consisted of an underground rapid-transit system, operated exclusively by electric power of the three-rail type, for the transportation of passengers between stations on Manhattan Island, N. Y., and stations in Jersey City and Hoboken. No package, freight, or express matter is handled by respondent. It has two double-track lines under the Hudson River, one known as the downtown line and the other as the uptown line, connecting on the New Jersey side and comprising in all about 8.5 miles of line, of which all but 0.63 mile is underground. The downtown line, on which the proposed increased fare is to apply, crosses under the river by two parallel tunnels between Exchange Place, Jersey City, and Hudson Terminal at Church Street between Cortlandt and Fulton Streets, in [fol. 535] New York, and extends westward in Jersey City from Exchange Place through a station at Grove and Henderson Streets to a station at Journal Square, where connection is made with the Pennsylvania Railroad. The uptown line crosses under the Hudson River by two parallel tunnels from Hoboken to Christopher Street, in New York, from which point it runs uptown under Sixth Avenue to a terminal at Thirty-third Street, with other stations at Twenty-eighth, Twenty-third, Nineteenth, Fourteenth, and Ninth Streets. The Thirty-third Street terminal is now being constructed by the city of New York in connection with construction of the city-owned subway under Sixth Avenue. During this construction respondent's uptown trains are operating into a temporary terminal at Twenty-eighth Street and Sixth Avenue.

The connection between the uptown and down town lines on the New Jersey side is made by a north-and-south line approximately parallel with the Hudson River, extending from a junction with the downtown line near Grove and Henderson Streets to a junction with the uptown line near Hoboken. These lines have stations in the respective terminals of the Delaware, Lackawanna & Western Railroad Company at Hoboken, the Erie Railroad Company at Jersey City, and

the Pennsylvania at Exchange Place. Respondent in conjunction with the Pennsylvania also operates a joint rapid-transit electric-train service between Hudson Terminal, in New York, and Newark, N. J., over respondent's line to Journal Square, thence over the Pennsylvania to Harrison to Market Street, Newark. Passengers on these trains may transfer to or from the uptown line where it connects with the downtown line in Jersey City. About 40.4 percent of respondent's tracks are under public streets, 36.7 percent under private property, and 22.9 percent under the Hudson River.

Hudson Terminal is located underneath the streets and two large office buildings owned by respondent in the square bounded by Church, Fulton, Greenwich and Cortlandt Streets in the financial district of lower Manhattan. At or near this terminal, connections can be made with several New York subway and elevated lines. Exchange Place in Jersey City is 80 feet underneath the Pennsylvania passenger terminal, near the water front. Elevators there convey passengers to and from the Pennsylvania station as well as the street, where there is a trolley and bus terminal. From Exchange Place westward the line is mainly under the Pennsylvania's right-of-way to Journal Square, in the central business district of Jersey City. This station is located in an open cut a short distance beyond the tunnel portals. Escalators convey passengers to and from the street, where there is a terminal for trolley lines and bus routes, both local and long distance. This station is owned by the Pennsylvania, operated by respondent, and used by both. Passageways and stairways connect respondent's stations with those of the Lackawanna and Erie, and with the Street, where there are trolleys and busses.

Respondent's tunnels are generally smaller in size than those of the New York subways and are too small for standard steam-railroad passenger cars. They are equipped with automatic block signals, averaging only 370 feet apart, each with an automatic train stop, and terminals and junctions are protected with interlocking equipment. The grades are numerous and severe, reaching a maximum of 5.46 percent, and the curves are numerous and long, with a minimum radius of 90 feet. For this reason, and also because 85 percent of respondent's road is below tide level, maintenance and replacement expenses are exceptionally

heavy. Respondent owns 324 passenger cars, specially designed for its small-size tunnels. They are of steel construction, with longitudinal seats accommodating 44 passengers, and have self-contained motors and sliding doors. They are not operated singly, but in trains ranging up to eight cars. The trains are operated on an interval schedule ranging from 90 seconds during rush hours to 30 minutes after midnight.

Respondent charges a local fare of 5 cents for intrastate [fol. 536] transportation in New York or New Jersey, 6 cents for interstate transportation on the downtown line, and 10 cents for interstate transportation on the uptown line. These interstate fares were respectively increased in 1920 from 5 cents and 7 cents upon our approval in *Local Fares of Hudson & M. R. Co.*, 58 I. C. C. 270. The fares charged in the joint rapid transit service between New York and Newark vary with the type of ticket, ranging from 20 cents for a one-way ticket to 12.4 cents per permissive ride on a 60-trip monthly ticket. Under joint arrangements later referred to, respondent receives agreed divisions from the Pennsylvania on all passengers handled jointly or interchanged between the two carriers both to or from Newark and to or from other points on or reached via the Pennsylvania. These divisions are 5 cents where the passenger is transported between Hudson Terminal and Exchange Place, 7.64 cents on all other passengers transported to or from Hudson Terminal, and 8.64 cents on passengers transported to or from New York stations on the uptown line. Respondent has a similar arrangement with the Lehigh Valley Railroad Company, the divisions from such passengers being received through the Pennsylvania. Respondent receives no division of the fares paid by passengers traveling only on the Pennsylvania's portion of the joint rapid-transit route. No increase in any of these fares or divisions except in the downtown fare of 6 cents is contemplated at this time.

Before respondent's lines were constructed the only way in which trunk-line passengers could cross the Hudson River to or from New York was on ferries operated by the various railroads. Commencing in 1903 respondent and its predecessors entered into a series of contracts with the Pennsylvania regarding the carriage of the latter's passengers to and from New York. Respondent is now a party to a number of tariffs published by the Pennsylvania

under which passengers of the latter holding tickets to or from New York may transfer to or from respondent without additional charge. Respondent is also a party to one passenger tariff of the Lehigh Valley under which there is a similar arrangement. It has no joint fares with any other railroad. Main-line passengers of the Pennsylvania and the Lehigh Valley transfer at Exchange Place, and passengers on Pennsylvania suburban trains which operate into its Exchange Place station, Jersey City, change there. The Pennsylvania's time-tables show the train schedules to and from Hudson Terminal as well as its own station at Thirty-third Street, New York. The Pennsylvania maintains a ticket office in Hudson Terminal where tickets may be purchased to any point on or reached via its lines.

The chief support for the proposed increased fare offered by respondent is the need for about $1,000,000 additional gross revenue in order merely to pay increased operating expenses, increased taxes, and interest on its funded debt, including current interest on its adjustment income bonds, but excluding cumulative interest which is now in arrears. Respondent owns and operates two 22-story office buildings erected over its Hudson Terminal and certain other miscellaneous real estate, hereinafter referred to as nonrailroad properties or operations. Its capital securities outstanding in the hands of the public total $112,710,950, of which $67,470,000 is funded and $45,240,950 preferred and common stock. Respondent has paid no dividends on its stock since 1933, and it is not here claiming that the proposed fare should or will enable it to pay such dividends. Its outstanding funded debt consists of $944,000 of first-mortgage 4.5-percent bonds, $35,242,600 of first-lien and refunding 5-percent bonds, and $31,284,000 adjustment income-mortgage 5-percent bonds.

On the basis of the present relation between the cost of its common-carrier or railroad properties and the cost of its nonrailroad properties, 83.16 percent of its bonded indebtedness has been allocated to its railroad operations and 16.84 percent to its nonrailroad operations. This basis of allocation is not questioned upon this record and will be accepted as proper for the purpose of this proceeding. [fol. 537] On this basis there are allocated to railroad operations $785,030.40 of the first-mortgage, $29,307,746.16 of the first-lien and refunding, and $26,015,774.40 of the adjustment income bonds, the annual interest on which is

$1,500,713 on the first two issues and $1,300,789 on the income bonds. Since 1933 the nonrailroad operations have earned their full interest, including that on their allocable share of the income bonds, plus net income ranging from $222,586 in 1934 to $9,396 in 1937. On the then outstanding bonded indebtedness of $56,108,551 thus allocated to the railroad operations, however, respondent has failed to earn the interest, including that on the allocable share of the income bonds by $302,406 in 1933, $279,078 in 1934, $487,289 in 1935, $394,810 in 1936, and $655,164 in 1937. Under the terms of respondent's adjustment income mortgage the interest on those bonds is not payable unless earned, but since 1920 deficiencies in the payment of such interest have become cumulative, so that at the end of 1937 the cumulative interest thereon was in arrears in the amount of $1,642,410.

The railroad operating expenses of respondent have been increased in recent years by higher costs of materials and supplies and of labor. In 1937 such expenses, other than taxes, were greater than in 1933 by 17.5 percent, and in 1936 by 6.01 percent, but less than in 1930 by 16.8 percent and in 1929 by 19.7 percent. Taxes in 1937 increased by 5.41 percent over 1936 and 5.62 percent over 1933, but were less than in 1932 by about 2 percent, in 1930 by 12.3 percent, and in 1929 by 10.5 percent. In 1937 wages increased over 1936 by about $140,000, and a further increase of about the same amount is anticipated in 1938. Certain groups of employees have agreed to a 5-percent increase in hourly wages for 1938 and to postponement of the effective date of a further 5-percent increase in such wages, and of a two weeks' vacation with pay, until respondent's railroad operations provide adequate revenues. Including those increases the wage scale of such employees is still substantially lower than that of the other subways operating in the metropolitan district, whose fixed charges are in part met by general taxation.

Respondent's railroad operating revenues increased steadily from $6,838,269 in 1920 to $9,073,512 in 1927 and then quite steadily declined by 34.4 percent to $5,956,426 in 1923. Slight increases occurred in the succeeding years to and including 1936, but in 1937 the total was $6,041,835 or 1.11 percent below 1936. From 1921 to 1932 the railroad operations produced a net income after interest on funded debt ranging from $1,487,139 in 1929 to $182,423

in 1932. Since then, as above indicated, respondent has been operating at a deficit in net income.

Expenditures approximating $1,500,000 upon respondent's railroad properties are said to be needed now and more later. Under the terms of the adjustment income mortgage all earnings available for bond interest must be applied to the extent necessary to pay coupons on such bonds. Accordingly, respondent cannot make capital improvements out of earnings or build up any reserve for the future until it has discharged the present accumulation of interest due on its income bonds and is earning something in addition to the full current interest thereon. It estimates that operating expenses and taxes in 1938 will exceed those in 1937 by about $249,111, or 6.4 percent, and that accordingly, based on traffic for 1937, its 1938 deficit in net income will be about $904,275. It estimates that for 1938 the proposed fare would yield about $1,078,612 in additional revenue, and that about $2,959,205 would remain for bond interest. The total annual interest on the railroad proportion of the outstanding bonds is $2,801,502, which would leave a net income of $157,703. It appears that respondent is being operated economically and efficiently, and that little can be expected in the way of reduced expenses.

The primary reason for respondent's financial difficulties lies in the substantial loss of passenger traffic since 1929. The appendix hereto shows the total number of passengers carried, segregated as between New Jersey intrastate, joint [fol. 538] rapid transit, uptown (including New York intrastate), and downtown. It will be noted that, using 1919 as 100, the total passenger traffic dropped to 97 percent in 1920, then increased to 120 percent in 1927 and 119 percent in 1928 and 1929, after which it declined to 80 percent in 1933, 81 in 1934 and 1935, and 83 in 1936 and 1937, the total in the latter year being 77,989,857. On the downtown line, on which the local fare was increased from 5 to 6 cents in 1920, the number of local passengers increased steadily until 1929, when it was 143 percent of 1919, and then declined to 104 percent in 1933, 106 percent in the next two years, and 110 percent in 1936 and 1937. The uptown local traffic, on which the fare was increased in 1920 from 7 to 10 cents, including New York intrastate traffic, declined to 89 percent in 1920, and then increased, but much more slowly than the corresponding increase on the downtown

line, to 105 percent in 1927, after which it declined to 97 percent in 1929, 61 in 1933, 59 in 1934, and 60 in 1936 and 1937. The New York intrastate passengers thus combined with the uptown traffic totaled only 353,868, or about 2 percent of the uptown traffic, in 1937. The joint rapid-transit traffic declined slightly in 1920 and then increased to 115 percent in 1927, after which it declined to 110 percent in 1929, 68 in 1933, and 69 in 1937. The New Jersey intrastate traffic declined to 97 percent in 1920, and then increased to 165 percent in 1923 and 149 percent in 1925, after which it declined to 120 percent in 1929, 77 in 1933, 96 in 1936, and 90 in 1937.

The foregoing decline in the total passengers carried by respondent is little different from the average decline on the principal trunk-line railroads reaching New York City by way of New Jersey. On the Erie and the Lackawanna, for example, which afford free trans-Hudson ferry service on their traffic to downtown stations, the number of passengers in 1936 was respectively 70 and 83 percent of that in 1919, as compared with 83 percent on respondent as a whole, 62 percent on the uptown line, and 96 percent on the downtown line, those percentages including the local as well as the joint rapid-transit passengers. However, in 1920, when the increased fares became effective on all railroads, while as compared with 1919 respondent's downtown traffic gained 1 percent and its uptown traffic declined about 11 percent, the Lackawanna gained 6 percent, the Erie 24 percent, and the principal New Jersey railroads combined 12 percent. In subsequent years while the showing made on the uptown line continued to be less favorable than on the trunk lines generally, that of the downtown line gradually became more favorable until in 1929 the total was 32 percent greater than in 1919, as compared with 2 percent less on the uptown line, 19 percent greater on both of respondent's lines combined, and 10, 24, and 15 percent, respectively, greater than in 1919 on the Lackawanna, the Erie, and the New Jersey railroads as a whole.

Respondent analyzed the foregoing traffic results for the purpose of supporting its claim, which as will later appear is disputed by protestants, that an increase from 6 to 10 cents in its downtown fare could be expected to result in a substantial revenue increase, and also that such a result could not be anticipated from an increase in its local fares elsewhere. It is admitted that the decline of 11 percent in

1920 under the preceding year in the number of uptown passengers was chiefly due to the increase at that time in the uptown fare from 7 to 10 cents. The greater part of this loss was diverted to the ferries, although some of it by reason of the narrow spread between the uptown and downtown fares probably reached the downtown line. The uniform fare on the New York City subways is 5 cents and the combination of that fare and respondent's 6-cent downtown fare made a lower through charge by 4 cents to upper New York than by the use of the uptown line and a subway at a cost of 15 cents. Subsequently, however, the uptown traffic increased, so that in 1927 it was 5 percent greater than in 1919, as compared with a corresponding increase of 35 percent on the downtown line. The opening of the Holland Tunnel in the fall of 1927, while it apparently had little effect on the downtown traffic, was largely re- [fol. 539] sponsible for the uptown decline in 1928 and 1929. The opening in 1931 of the George Washington Bridge had a like, but less drastic, effect on the uptown traffic, and the opening of the first tube of the Lincoln midtown tunnel late in 1937 has had a similar effect on both lines. Thus, the total number of busses crossing the Hudson River increased from about 70,000 in 1925 to 790,000 in 1930, 828,000 in 1932, 1,018,000 in 1935, 1,071,000 in 1936, and 1,112,000 in 1937. The minimum bus fares are 10 cents over the George Washington Bridge and 25 cents through the tunnels. The combinations made by adding to the uptown fare the bus fares, generally 5 or 10 cents, to and from the Jersey City stations of respondent are in some instances higher, in others the same, and in others lower than the through bus fares. On the other hand, with some exceptions, the bus fares are higher than the commutation fares of the trunk-line railroads plus respondent's uptown fare. The total number of private automobiles crossing the Hudson River increased from about 7,000,000 in 1924 to 17,668,000 in 1932, 22,416,000 in 1935, and 25,811,000 in 1937. The river fare for private automobiles ranges from 20 to 25 cents on ferries to 50 cents for the tunnels or the bridge. More of the private automobiles move to and from the uptown than the downtown area.

Of course, the chief cause of the general decline in respondent's traffic since 1929 was the economic depression. Other factors are the improvement in shopping and amusement centers in New Jersey, the coincidence of the 5-day

working week, the decline as a shopping center of Sixth Avenue in Manhattan served directly by respondent between Eighth Street and Thirty-third Street, and the development of a new business center on Fifth Avenue extending as far north as Fifty-seventh Street, which is readily accessible to motor vehicles.

Basing upon the foregoing facts, respondent maintains that the steady decline in traffic on the uptown line has been due, aside from the depression, chiefly to the increased motor competition since 1927 and to the change in the character of the midtown territory served by that line, and not in any large degree to the 10-cent fare; that the trans-Hudson motor competition is primarily operative against the uptown and not the downtown line; that the diversion from the uptown line to competitive motor transportation has been influenced largely by the greater convenience and flexibility of the motor service and without reference to relative cost; and that the differential between the uptown 10-cent fare and the downtown 6-cent fare has tended to divert traffic from the uptown to the downtown line. Accordingly, respondent insists that any increase in the uptown fare would tend to accelerate bus competition, and that it can obtain the necessary additional revenue only by increasing the downtown fare as proposed.

Respondent does not believe that it could secure increased revenue by a reduction in its fares and consequent stimulation of increased traffic. In most cases the bus fare to New York plus the New York subway fare is the same as or higher than the steam-railroad commutation ticket plus either of respondent's fares. For this reason respondent believes that reduced fares would not divert traffic from the busses. As bus services become established and equipment improved, it is expected that this type of competition will increase, especially to and from the portion of Manhattan which is now served by the uptown line. Most of the bus lines serve the midtown business center and generally do not reach lower Manhattan. Moreover, it seems to respondent unlikely that a fare reduction would attract passengers from the ferries, since the greater portion of the ferry traffic consists of steam-railroad passengers entitled to free ferry service under their New York tickets.

Because the fundamental cause of respondent's lack of income is the decline in traffic, especially on the uptown line,

it has made a study to determine whether that line has now reached the point where it has become a burden upon the road as a whole. Income and expenses, including taxes allocable to railroad operations, were divided between the [fol. 540] uptown and downtown lines in 1937 on the basis of a formula, of which there has been practically no criticism. The results indicate that in that year the downtown line contributed $1,845,747 and the uptown line $300,592 to net income available for bond interest; that if the uptown line had been abandoned and 50 per cent of its traffic lost, and the remainder diverted to the downtown line, the balance available for bond interest would have been approximately $336,388 less than it was, and if all of its traffic had been lost the balance available for interest would have been about $817,492 less than the actual. This story indicates, therefore, that respondent would be worse off if the uptown line were eliminated.

It is admitted by respondent that some diversion of traffic, especially to the ferries, would result from the proposed fare. The extent of such probable diversion is variously estimated by its witnesses as from 11 to 15 per cent. Taking into consideration a probable diversion of about 11 per cent, respondent estimates that the proposed fare would enable it, on the basis of a 2-per cent reduction in the 1937 traffic and after making provision for increased wages, taxes, and other expenses, to pay full bond interest and accumulate an annual surplus of about $157,000 with which to liquidate the interest arrearages on the income bonds and later to create a modest reserve against contingencies. Since the beginning of 1938 and up to the time of the hearing in the latter part of February, respondent's traffic had shown a reduction under the corresponding weeks in 1937 of between 5 and 6 per cent instead of the 2-per cent reduction included in the foregoing estimate. Respondent also feels that a uniform fare on the uptown and downtown lines would tend to eliminate the distortion between the traffic on the two lines and result in operating advantages.

The original cost of respondent's railroad properties, compiled from its accounts and those of the predecessor companies, is indicated to be $66,543,281.07. The respective amounts for the various projects from which this sum is determined are all supported by vouchers, with the exception of two items. One is an item of $4,192,670.71 representing the expenditures from 1902 to 1906, inclusive, of the Hudson

Improvement Company in connection with the construction of the New York & New Jersey Railroad, and the other is an item of $2,000,000 for property acquired prior to 1902 by the New York & New Jersey Railroad Company in connection with the reorganization of the Hudson Tunnel Railway Company. The first item was taken from the books of the company and there seems to be no doubt of its accuracy. With respect to the second item the following appears in *Local Fares of Hudson & M. R. Co., supra*, page 273:

The property acquired by the New York & Jersey Railroad Company for $400,000 was appraised at $2,000,000, and the appraised value has been used as the cost thereof. No liabilities were assumed in the acquisition of the property; therefore the purchase price should be credited to investment in accordance with our accounting rules.

It now appears that while the price bid for this property at the foreclosure sale was $400,000, this bid was but a step in the reorganization, the payments being largely in bonds of the old company; that apparently something more than $3,000,000 in securities of the New York & Jersey Railroad Company were issued for the acquisition of this property and in exchange for the securities of and in settlement of claims against the Hudson Tunnel Railway Company; and that in the judgment of the respondent's officials who have examined the records of the predecessor companies at least $2,000,000 must have been expended in the construction of the property covered by this item. Upon this record this item appears to be adequately supported.

In behalf of respondent a civil engineer with many years of experience in tunnel, subway, and other heavy construction estimated the reproduction cost of respondent's railroad properties new, on the basis of 1914 prices, less depreciation, at $68,272,998.96. Prices in 1914 were used as representing a fairly stable level for an extended period prior thereto. The details on which this estimate was made are of record and have met with little criticism. The de- [fol. 541] preciated cost of reproduction new at current prices would be greater than the above estimate at 1914 prices. This estimate is offered in confirmation of the original construction cost of $66,543,281.07 shown by respondent, not only as a prudent investment, but as the actual cost of construction. The net income of $2,959,205 estimated by respondent for 1938 if the proposed fare were to

become effective would be 5.27 per cent of the bonded indebtedness allocated to its railroad properties, 4.45 per cent of the original construction cost, and 4.33 per cent of the depreciated reproduction cost new.

Respondent insists that the proposed fare would be less than a reasonable maximum and lower than we could prescribe without confiscation. It states that the 10-cent fare here proposed was authorized in *Passenger Fares and Surcharges*, 214 I. C. C. 174, wherein a minimum charge of 10 cents for all classes of equipment was authorized to be observed. The findings and order in that proceeding have reference only to noncommutation traffic and not to the kind of traffic which largely moves under the fares here proposed to be changed. It is incorrect, therefore, to say that the decision or order in that proceeding is any authority for increasing respondent's 6-cent fare, or that it affords any criterion as to what the instant fare should be.

The present fare here proposed to be increased to 10 cents applies between Hudson Terminal and Exchange Place, 1.25 miles, Grove and Henderson Streets, 1.79 miles, Journal Square, 3.2 miles, the Erie station, 2.08 miles, and Hoboken, 2.96 miles, an average of 2.26 miles. The present 10-cent fare not here proposed to be changed applies between the Thirty-third Street terminal in New York and the Erie station, 3.43 miles, Hoboken, 3.53 miles, Exchange Place, 4.26 miles, Grove and Henderson Streets, 4.29 miles, and Journal Square, 5.71 miles, an average of 4.24 miles. The minimum distance between stations on the uptown line is between the Erie station and Christopher Street, the first station east of the river, 1.91 miles, as compared with the minimum distance on the downtown line of 1.25 miles. The scheduled running time under the downtown fare to Hudson Terminal is three minutes from Exchange Place, five minutes from Grove and Henderson Streets, six minutes from the Erie station, and nine minutes from Hoboken and Journal Square. On the uptown line the time to the Twenty-eighth Street station is 13 minutes from Hoboken and the Erie station, 15 minutes from Grove and Henderson Streets 16 minutes from Exchange Place, and 19 minutes from Journal Square.

Compared with the foregoing fares and distances on respondent's lines, a passenger can travel on the three rapid transit systems serving Manhattan and Brooklyn, N. Y.,

for maximum distances on the respective systems of 13.28, 17.65, and 18.80 miles at a 5-cent fare. All of these systems, however, regularly receive financial aid from the city of New York. Generally, in Jersey City rents are lower than in New York and taxes are lower than in Manhattan.

One-way fares of 10 cents apply on the trunk-line railroads for distances of from 0.6 mile to 5 miles, but apparently little, if any, commutation traffic moves under those fares. Most of the commutation passengers using the ferries travel on period tickets, good generally for from 10 to 60 trips. The 60-trip monthly tickets vary from 7 to 10 cents per trip for distances up to at least 6 miles. For example, on the Central Railroad of New Jersey the 60-trip monthly ticket between 10 New Jersey stations, 1.3 to 5 miles from Jersey City, on the one hand, and New York on the other, ranges from 8.7 to 10 cents per permissive trip; and between New York Central stations in upper Manhattan and Grand Central Station, from 4 to 5 miles, it averages 7 cents. The principal competition of respondent's downtown service is with the railroad-owned ferries, of which six operate between stations in Weehawken, Hoboken, and Jersey City, the latter in close proximity to the Exchange Place station of respondent, on the one hand, and points in lower Manhattan within a few blocks of Hudson Termi- [fol. 542] nal, on the other. The fares on these ferries range from 3 to 6 cents per trip, and on several of them volume transportation may be purchased at the rate of 10 trips for 25 or 30 cents, or 21 trips for 60 cents.

Protestants base their objection to the proposed fare upon the grounds that the present fare is wholly adequate for the service rendered thereunder, and is as high as the traffic may reasonably be expected to bear and will bear; and that before any increase in respondent's fares is authorized, the possibility of securing additional revenue from the Pennsylvania through increased divisions on interline traffic with that road should be more thoroughly explored. They emphasize that Jersey City, Hoboken, and other municipalities in Hudson County, which extends along the west bank of the Hudson River and New York Bay and largely parallels lower Manhattan on the other side of the river, are integral parts of the New York metropolitan area; that the reasonable further development of that area depends in large measure upon the transit facilities afforded between the residential suburban communities,

such as those here vitally concerned, on the one hand, and the great industrial and commercial center of lower Manhattan on the other; and that in order to meet the transit requirements of northern New Jersey in that respect respondent should be and can be made to serve more advantageously, and with greater profit to it, under the present fares than under increased fares. Indeed, protestants insist that since this New Jersey area is in strong competition for population and industries with other sections east of the river, between which and lower Manhattan a 5-cent fare prevails for much longer hauls than on the lines of respondent between New Jersey and Manhattan, respondent as well as this New Jersey area would benefit more from 5-cent fare than from any other. They point to the fact that under a 5-cent fare Bronx, Queens, and Kings Counties, east of the river, in a certain period gained, respectively 73, 705, and 219 percent in population, while in the same period the population of Hudson County, under the higher fares of respondent, gained only 30 percent. There can be little doubt that the growth in population of the various suburban communities now composing the New York metropolitan area has been largely dependent upon and commensurate with the development of low-priced rapid-transit service between such communities and lower Manhattan.

Protestants reason that, if the uptown service were as profitable as the downtown service, respondent would not be in need of additional revenue, and that the downtown passenger is here being asked to bear the burden brought about by the unprofitableness of the uptown line, which in turn is due largely, they insist, to the inadequate revenues received by respondent from traffic interchanged with the Pennsylvania. They urge that the downtown passenger cannot be expected to pay more than is reasonable for the service which he receives, regardless of respondent's revenue needs as a whole. It is of course evident that what is reasonable for a particular service depends greatly upon the value of the service to the patron, but it depends also upon the revenue needs of the carrier. It has long been the law that a carrier has no constitutional right to receive what would be deemed a fair return on each distinct class of traffic or service or upon any particular portion or division of its road, independent of any other consideration. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 203 Fed. 56,

affirmed, 231 U. S. 736; *Ann Arbor R. Co.* v. *United States*, 30 Fed. (2d) 940. The revenues of carriers are not ordinarily to be judged on the basis of the return upon particular portions or divisions of their roads, but upon their roads as a whole. *Class Rate from Chestnut Ridge Ry. Stations*, 41 I. C. C. 62. The imposition, for the general welfare, of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service performed by the same carrier is not by reason of that fact alone, unlawful. *Fifteen Per Cent Case*, 1931, 178 I. C. C. 539, 565. Respondent has indicated no purpose to [fol. 543] abandon the uptown line. In 1937 it was used by 21,314,081 interstate passengers, of whom 83.3 percent were local and 16.7 percent interline with the Pennsylvania. In that year, as stated, the uptown line contributed more than $300,000 to net income available for bond interest. Under these circumstances we cannot agree that in considering the reasonableness of the proposed downtown fare we must disregard respondent's revenue needs as a whole.

Admitting the need for increased revenue, two questions present themselves: First, is the proposed increased fare reasonable from the standpoint of the value of the service to the public; and second, would it produce the needed additional revenue or would some other fare be more likely to produce the desired result? In determining the latter question, consideration may be and should be given to whether any railroad service of respondent, other than the local downtown service, can be made to, and should be expected to, contribute some or all of the additional revenue needed.

From what has already been said herein it is evident that any increase in the uptown fare of 10 cents could hardly be expected to return increased net revenue to respondent. The only other possible source of increased revenue in the uptown service would be by increasing the Pennsylvania's division of 8.64 cents on the joint rapid-transit traffic, which will be later discussed. In this connection, however, it is noteworthy that the cost per passenger to respondent in the uptown service is evidently substantially greater than that in the downtown service. This is apparent, not only from the difference in the hauls, but from the number of passengers per car transported on the respective lines. Thus, during the morning and evening peak traffic the

average number of passengers per car to and from New York on a typical weekday is, respectively, 80.8 and 85.8 downdown and 53.1 and 73.3 uptown, and during the 24-hour period, 42.2 downtown and 22.8 uptown. The combined average of the two is 34.6 passengers per car. From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents.

Protestants state that the circumstances and conditions on the downtown line under which the 6-cent fare was approved in 1920 have not since changed. They point out that practically the same equipment which was then used is still in service and that the quality and quantity of the service is about the same, but that the 1937 volume of passengers was greater than in 1920. Admitting that respondent's fundamental problem is a decline in traffic and an increase in expenses, protestants insist that the traffic decline is in no way attributable to the local downtown traffic, which in 1937 was 110 percent of that in 1919 as compared with 60 percent on the uptown line. They point to the fact, as stated by respondent, that while the decline since 1919 in traffic on its line as a whole to 83 percent in 1937 has been no greater than that on the New Jersey railroads generally, there has been no such general decline in traffic east of the Hudson River. For example, on the Long Island Railroad the 1937 traffic was 141 percent of that in 1919, on the New York Central it was 116 percent, on the New York, New Haven & Hartford 101 percent, and on the New York, Westchester & Boston 193 percent.

As stated, respondent is a party to a number of Pennsylvania Railroad tariffs publishing joint commutation and noncommutation fares to and from New York. From and to points within the New York commuting area in Pennsylvania and New Jersey a supplemental fare of 15 cents per trip on single-trip tickets and 10 cents per trip on commutation or other multiple-trip tickets is charged by the Pennsylvania on all traffic using its Thirty-third Street Station in New York. The charging of supplemental fares as a regulatory practice under these circumstances, in order to avoid congestion from and to that station, was found to be not unreasonable or otherwise unlawful in [fol. 544] *Davis* v. *Pennsylvania R. Co.*, 226 I. C. C. 723,

decided March 22, 1938. No extra or supplemental fare is assessed on Pennsylvania Railroad passengers using either the joint service of respondent or the Pennsylvania's own ferry service from Exchange Place to New York. The division of 5 cents which respondent receives from the Pennsylvania for transporting the latter's line-haul passengers from Exchange Place to Hudson Terminal was agreed upon in 1903, and has not since been changed. No such arrangement has been made with the Erie or the Lackawanna, whose time-tables merely refer to respondent as an available facility between their respective railheads and New York, and state the fare of 6 cents downtown and 10 cents uptown for such supplemental services. In 1935, a typical year, 47 percent of the Erie passengers and 48 percent of the Laskawanna passengers who could have used the ferries without additional charge made use of the lines of respondent at the extra fare. Thus, such Pennsylvania Railroad passengers entering New York can reach Hudson Terminal at a lower rate of fare than can the Erie or Lackawanna passengers, and the division paid for such trans-Hudson service by the Pennsylvania is only one-half of the local fare herein proposed for such service, even though the great volume of the local traffic moves during the peak periods and undoubtedly with much less comfort and convenience to the passenger than is true of many, if not most, of the trunk-line passengers transferred at Exchange Place, a large proportion of whom travel at other than peak periods. Moreover, out of the revenue accruing to respondent from the 5-cent division, respondent pays back to the Pennsylvania 46 percent thereof for easements granted by the latter for subsurface rights at Exchange Place. In 1937 that payment amounted to $30,964.

Respondent's divisions from the joint rapid-transit service of 7.64 cents downtown and 8.64 cents uptown are substantially on the basis of a mileage prorate, although respondent's investment is about $8,000,000 per mile as compared with a much smaller proportionate investment by the Pennsylvania in its Newark line. Out of those divisions respondent pays the Pennsylvania for 917 feet of trackage rights between the tunnel portal and Journal Square and for the use of the joint facilities at Journal Square station. This payment aggregated $81,664.41 in 1937.

Protestants contend that the benefits to the Pennsylvania from its joint arrangements with respondent far outweigh

the financial returns therefrom; that the contractual relations between the two roads are inequitable and unjust to respondent and result in placing an undue burden upon its local passenger traffic; and that if these inequities were corrected so that respondent would receive from the Pennsylvania adequate compensation for the services rendered to the latter, and a local fare on both the downtown and uptown lines of 5 cents instead of 10 cents were established, respondent would thereby increase its earnings and insure profits to its stockholders. In 1908, prior to construction of the tunnel and Thirty-third Street terminal of the Pennsylvania, the trans-Hudson ferries of that road transported about 30,000,000 passengers, as compared with only 565,000 in 1937. The Pennsylvania is the only road, of the many serving the New York metropolitan area, which has joint arrangements with any carrier serving lower Manhattan. On the uptown line it has the advantage of originating and discharging passengers at six stations in addition to Thirty-third Street. Such arrangements have made it possible for that road to terminate its local New Jersey passenger traffic at a number of advantageous points on Manhattan without any capital investment at such points, and to operate its Thirty-third Street terminal much more advantageously than would otherwise be the case. For operating reasons the Pennsylvania is anxious to avoid use of its Thirty-third Street terminal by commutation traffic and, as stated, its efforts in that respect by charging supplemental fares for that purpose have been approved. According to a witness for the Pennsylvania, the cost of terminating or originating [fol. 545] a passenger at the Thirty-third Street station of that road is about 84.8 cents, exclusive of the cost of operating the trains. As stated, the Pennsylvania pays to respondent for the privilege of using the latter's facilities to Manhattan from 5 cents to 8.64 cents per passenger, the latter amount taking the passenger to a station immediately adjoining the Pennsylvania Station. In exchange for the foregoing chief benefits accruing to the Pennsylvania by virtue of this joint arrangement with respondent, the latter received from the Pennsylvania in 1937 a net amount approximating $1,140,804.

Regarded from the standpoint of what is reasonable, if the present division of 7.64 cents downtown and 8.64 cents uptown in the joint rapid-transit service, in which respondent bears the expense of only one terminal service, are to be

regarded as inadequate, it would seem difficult to find not justified at least some increase in the local downtown fare of 6 cents, which embraces the expense of two terminal services. What has just been said, of course, has no bearing upon the adequacy or inadequacy of the 5-cent division to respondent on Pennsylvania line-haul passengers interchanged at Exchange Place, which in 1937 numbered only 1,447,783, and produced for respondent $72,389.15 in revenue. In the joint rapid-transit service 11,485,088 downtown and 3,553,511 uptown passengers were transported in 1937, from which respondent derived $1,184,484, an average of 7.88 cents per passenger, as compared with an average of 7.2 cents per passenger under the local fares of 6 and 10 cents, and 7.1 cents under all of respondent's local fares. It is thus apparent that if the additional revenue of about $1,000,000 here sought is to be derived from the Pennsylvania passengers, it could be done only by increasing re-pondent's divisions therefrom, on the basis of the 1937 traffic, by about 80 percent. The average joint commutation fare on Pennsylvania passengers between New Jersey points and Hudson Terminal, on the basis of 60 trips a month, is about 14.3 cents. Respondent states that the present contracts embodying the joint arrangements with the Pennsylvania on the joint rapid-transit service were signed in 1932, at which time the revenue possibilities in this respect were quite thoroughly explored, and that since the average division which it now receives on Pennsylvania traffic exceeds somewhat the average of all of respondent's local fares, it is not in a position to seek an increase in those divisions until its present local fare on the downtown line has been increased.

Protestants urge that, since downtown New York may be reached from residential areas east of the Hudson River for distances of more than 10 miles at a 5-cent fare, the proposed fare would place Jersey City under a competitive handicap, so that it could not hope to locate new industries and population or to hold its present industries and population. It is claimed that real-estate values in Jersey City, especially in the vicinity of Exchange Place and Journal Square, as well as in Bayonne and other nearby communities, would be seriously depreciated, and that numerous wage earners, who comprise most of the commuters, could not bear an increase in transportation costs and would be

forced to move to other residential areas affording cheaper transportation to and from their daily employment. They particularly stress the fact that Jersey City is geographically nearer to downtown New York than any other suburban area, and that therefore any fare which is twice that to and from residential areas east of the Hudson River would completely disregard the geographical advantages of Jersey City. The acting mayor of that municipality testified that, if the proposed fare should become effective, the only recourse for the protection of the interests of the city and its people would be to divert the local transportation facilities from the respondent to the ferries so as to permit travel to and from lower New York at transport-tion costs no greater than at present by use of the downtown line of respondent.

Under the proposed fare the transportation cost to the passenger would be increased on the basis of 60 trips monthly from $3.60 to $6 per month to the passenger within [fol. 546] walking distance of respondent's stations in Hoboken or Jersey City, from $6.60 to $9.00 per month to those paying a 5-cent bus or trolley fare to reach respondents' stations, and from $9.60 to $12 to those paying a 10-cent fare to respondent's stations. The population of the various communities of Hudson County embraced in the area from which the foregoing bus and trolley fares prevail is about 700,000, a large percentage of whom travel daily except Sundays over respondent's downtown line.

Compared with the foregoing monthly costs the 60-trip commutation fares between New York and points 15 miles distant are $8.26 on the Central of New Jersey, $9.18 on the West Shore, $10.30 on the Erie, $10.45 and $11.10 on the Lackawanna, $8.58 on the Pennsylvania, $10.94 on the New York, New Haven & Hartford, $9.29 on the New York Central, and $7.48 and $9.30 on the Long Island. The first five fares include trans-Hudson transportation by ferry, and the fare on the Pennsylvania includes the use of respondent. This latter fare of $8.58, for example, applies from Elizabeth, N. J., and is lower than the resulting cost of $9 from points within the 5-cent bus zone to respondent's stations plus the proposed 10-cent fare. Passengers traveling from Elizabeth to New York pass through a portion of that bus zone. Monthly commutation service between New Jersey stations and lower Manhattan ferry stations or Hudson Terminal may be had for less than $8 from Newark on

the Pennsylvania, 8.8 miles, and Hillside on the Lehigh Valley, 12.7 miles; for less than $9 from South Elizabeth on the Pennsylvania, 14.9 miles, and Roselle Park on the Lehigh Valley, 16 miles; and for $12 or less from Menlo Park, 24.2 miles, Perth Amboy, 11.88 miles, and Cliffwood, 32.8 miles, on the Pennsylvania, and from South Plainfield, 26.5 miles, New Market, 29.1 miles, and Bound Brook, 33.1 miles, on the Lehigh Valley. To lower Manhattan ferry stations from New Jersey points on the Erie, Lackawanna, Central of New Jersey, and West Shore the monthly commutation fares range from $5.28 from various stations in Jersey City and from North Bergen 2.5 miles, and Bayonne 5.4 miles, to $5.40 from Secaucus 4.5 miles; $7.92 from Elizabeth 12.5 miles; about $9 or less from Harrison 8 miles, Carteret 16.7 miles, East Orange 11.6 miles, and Bergenfield 13 miles; and less than $12 from Bound Brook 31.2 miles, South Orange 15 miles, Ridgewood 21.9 miles, Verona 21.1 miles, and Midland Park 25.2 miles. With such large areas available west and east of the Hudson River from which the transportation would be cheaper than from Jersey City and other points in Hudson County, protestants insist that there would be a strong inducement to move elsewhere and take advantage of such cheaper transportation.

The number of passengers using the busses of certain protesting bus companies in reaching the New Jersey stations of respondent for the purpose of using the latter's facilities approximate 20,000,000 a year. These bus lines represent an investment of over $4,000,000 and cover 50 miles of routes in Hudson County and 57 miles to and from suburban towns. They did a gross business of $4,412,596 in 1930 and $3,426,544 in 1937, a loss of about 22.4 percent, as compared with a loss in respondent's railroad operating revenues during that period of 30 percent. All or practically all of these bus lines in Hudson County were in full operation in 1925, and to them protestants ascribe the increase in respondent's traffic subsequent to 1920. If the proposed fare were to become effective and protestants' claim that a great number of passengers now using the facilities of respondent would seek cheaper means of transportation to and from New York were realized, these bus lines would feel called upon to shift a substantial portion of their facilities now reaching respondent's stations to the nearby ferries or to nearby steam-railroad stations. For example, Bayonne passengers using respondent's downtown line now

pay a 10-cent bus fare plus respondent's fare of 6 cents, or 16 cents. The Central of New Jersey serves Bayonne, about 6.5 miles from New York, at a 60-trip monthly fare in- [fol. 547] cluding ferry transportation of $5.36, or about 9 cents per trip if within walking distance of the station and 14 cents if within a 5-cent bus zone. By use of the proposed fare the cost to such passengers would be 20 cents, which protestants state would reflect such a marked difference over the Central of New Jersey fare that the latter would be preferred. For every such passenger now using the line of respondent the bus company serving Bayonne would either lose 5 or 10 cents, dependent upon whether the passenger elected to walk to the Central of New Jersey station or use a re-routed bus. Greenville and West Bergen, N. J., passengers can now reach lower Manhattan for 11 cents by paying a 5-cent bus fare and the present downtown fare of respondent. If the latter fare were to become 10 cents the cost of such passengers would be increased to 15 cents, as compared with fares over the Central of New Jersey of 9 cents to those walking to the station and 14 cents to those using a 5-cent bus to the station.

Commuters and other passengers living in various sections of the New Jersey commuting area testified that if the increased fare becomes effective they will use other and cheaper trans-Hudson facilities. Protestants estimate that the proposed fare would result in an annual diversion from respondent of not less than 20,000,000 passengers or close to half of the 41,920,020 that traveled at the 6-cent fare in 1937. Much of this diversion, they believe, would come from Lackawanna and Erie passengers now paying the extra 6-cent fare instead of taking advantage of the free ferry service. About 16,450,000, or nearly 50 percent of the total Erie and Lackawanna trans-Hudson passengers, used respondent's facilities in 1937. What proportion of that number used the downtown line does not appear. The remainder of the diversion it is estimated would be from passengers reaching respondent's New Jersey stations mostly by bus or on foot.

It is apparent that the price factor is not the only consideration which enters into the choice by many passengers of trans-Hudson transportation, for the transportation cost to numerous passengers now using the downtown line as well as the through bus service via the tunnels or the bridge is somewhat greater than it would be if one or another of the ferries were used. Undoubtedly the matters of conven-

ience and of time are important. However, it stands to reason that there is a limit beyond which price becomes the determining factor, especially in a period of business recession such as exists today, and to commuters many or most of whom are in the low-income class. It is clear that cheaper transportation facilities are available to a large number of respondent's passengers now using the downtown line, at fares which are materially lower than in connection with respondent should the proposed fare become effective. The record leaves no doubt that in the latter event a substantial proportion of such passengers would use other and cheaper facilities, at least for a time. Conditions at this time are such that the price factor would necessarily be given greater weight by the average commuter than was the case in 1920. Under such conditions an increase today from 6 to 10 cents on the downtown line in what is very largely a commuter's fare, would be quite a different thing from the increase in 1920 from 7 to 10 cents on the uptown line in what was to a material extent a noncommuter's fare and therefore not so susceptible to the price factor, even in normal times. It is evident, therefore, that the traffic loss which respondent might be expected to experience under the proposed fare would be substantially greater than was the case on the uptown line in 1920.

Protestants state that while respondent is efficiently operated it is inefficiently managed, and that if this were not so the uptown line would today be paying its way as does the downtown line and thus the revenues of respondent would be adequate to meet its needs. In support of this charge protestants point to the fact that respondent has made practically no effort to advertise its services to the public, has [fol. 548] made no attempt to contact any of the local bus lines serving its New Jersey stations with the object of meeting the competition of through bus lines or private automobiles using the two vehicular tunnels or the bridge, and has failed to effect joint arrangements, somewhat like those maintained between it and the Pennsylvania, with the Lackawanna and the Erie, and perhaps, through extension of its rails, with the Baltimore & Ohio, the Central of New Jersey, and other railroads, and to the alleged fact that respondent is not securing adequate revenue from the Pennsylvania for its services to that carrier.

Compared with other fares which are generally used by commutation passengers between the New York commuting

area and downtown Manhattan, especially from and to New Jersey points, the proposed fare is high. It is true, as urged by respondent, that its average investment is about $8,000,000 per mile, as compared with an average for all class I railroads in the country of about $112,000, but that comparison means little for respondent's facilities are all essentially terminal or metropolitan whereas the opposite is true of the class I carriers generally. What the average investment in terminal facilities of the latter carriers and more particularly the New York City carriers may be does not appear. Placed alongside the fares or charges of record, other than those on the city-subsidized New York subways, for somewhat similar transportation services on other lines in the New York metropolitan area, a maximum reasonable local fare on the downtown line of respondent may not exceed 8 cents.

A fare of 8 cents would restore the 2-cent spread prior to 1920 between the uptown and downtown fares, thus eliminating respondent's criticism of the present spread as having had the effect of diverting a substantial number of passengers from the uptown to the downtown line.

From the standpoint of revenue results to respondent, the precise traffic diversion under any increased fare is, of course, not susceptible of exact calculation, but the record is convincing that under a 10-cent fare it would be materially greater than the maximum of 15 percent estimated by respondent. While certain of protestants' witnesses stated that they would be as strongly opposed to an 8-cent as to a 10-cent fare, the preponderance of the evidence indicates that the diversion would be substantially greater under a 10-cent than under an 8-cent fare. Because of the expressed intention if the present fare is increased of establishing through bus service between Hudson County and downtown New York, a form of competition which is more likely to materialize in substantial degree if respondent's downtown fare is made 10 cents than if it is made 8 cents, and bearing in mind the declining revenue results entailed chiefly by motor competition under the 10-cent fare on the uptown line, upon this record we find as a fact that the revenue results to respondent, especially over an extended period of time, would be more favorable under an 8-cent than under a 10-cent fare on the downtown line.

Assuming as did respondent a loss of traffic generally in 1938 under 1937 of 2 percent, and assuming a maximum

traffic diversion from the downtown line of 15 percent, the net income available for bond interest at the end of 1938 on the basis of respondent's estimates but with an 8-cent downtown fare would be about $2,260,817. That amount would represent a rate of return of 3.4 percent on the basis of the original cost and 3.31 percent on the basis of the depreciated reproduction cost new. If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic.

We conclude that the proposed fare of 10 cents would be unreasonable under sections 1 and 15a of the act and has not been justified, but that a fare of 8 cents has been justified. The suspended schedules will be required to be canceled and [fol. 540] the proceeding discontinued, without prejudice to the establishment of a maximum fare of 8 cents.

MILLER, *Commissioner*, dissenting:

I dissent from the finding of the majority that the proposed fare of 10 cents has not been justified. The record leaves no doubt in my mind that this fare would be reasonable and lawful for the services performed, and that it has, therefore, been amply justified. The majority report leaves me with the impression that this respondent, which is badly in need of revenue, is denied the right to assess this fare simply because of a fear that it would result in a material diversion of traffic from its line. The respondent is willing, and is entitled, to assume this risk. We have no right to substitute our judgment in this respect for that of the management of the respondent.

I am authorized to state that Commissioner Mahaffie concurs in this expression.

Commissioner Eastman did not participate in the disposition of this proceeding.

[fol. 550]

APPENDIX

Hudson & Manhattan Railroad passengers carried by routes

	New Jersey Intrastate		Rapid transit, uptown and downtown		Uptown, including New York intrastate		Downtown		Grand total	
	Passengers	Index numbers	Passengers	Index numbers	Passengers	Index numbers	Passengers	Index numbers	Passengers	Index numbers
Year 1919	1,637,383	100	24,033,768	100	30,319,813	100	38,111,497	100	94,102,461	100
Year 1920	1,584,110	97	23,783,605	99	27,087,589	89	38,716,225	102	91,171,529	97
Year 1921	1,835,784	112	25,899,386	108	28,083,120	93	41,321,759	108	97,140,049	103
Year 1922	2,130,347	130	26,838,266	112	28,770,212	95	43,484,021	114	101,222,846	108
Year 1923	2,705,584	165	27,225,615	113	29,618,468	98	46,405,028	122	105,954,695	113
Year 1924	2,389,849	146	27,390,221	114	30,007,500	99	47,226,123	124	107,013,693	114
Year 1925	2,443,808	149	27,398,235	114	30,675,443	101	48,067,001	126	108,584,487	115
Year 1926	2,250,393	137	27,156,448	113	31,418,219	104	49,375,571	130	110,200,631	117
Year 1927	2,196,790	134	27,745,429	115	31,891,747	105	51,307,763	135	113,141,729	120
Year 1928	2,053,701	125	27,036,524	112	30,512,632	101	52,186,165	137	111,789,022	119
Year 1929	1,966,791	120	26,443,684	110	29,480,062	97	54,405,315	143	112,295,852	119
Year 1930	2,036,249	124	24,288,046	101	27,407,490	90	52,961,725	139	106,693,510	113
Year 1931	1,806,472	110	21,381,341	89	24,867,202	82	48,407,014	127	96,462,029	103
Year 1932	1,354,197	83	18,411,394	77	21,221,458	70	42,705,313	112	83,692,362	89
Year 1933	1,268,933	77	16,298,360	68	18,406,246	61	39,615,095	104	75,588,634	80
Year 1934	1,544,091	94	16,355,546	68	18,187,443	60	40,225,343	105	76,312,423	81
Year 1935	1,516,773	93	16,437,679	68	17,761,975	59	40,268,662	106	75,985,089	81
Year 1936	1,575,860	96	16,871,914	70	18,175,132	60	41,845,442	110	78,468,348	83
Year 1937	1,469,017	90	16,486,382	69	18,114,438	60	41,920,020	110	77,989,857	83

[fol. 551] PLAINTIFF'S EXHIBIT "5"

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of August, A. D. 1943.

Investigation and Suspension Docket No. 4394

Passenger Fares on Hudson and Manhattan Railroad Company

Upon consideration of respondent's petition of July 8, 1943, for reconsideration and modification of the findings made in the report on further hearing of June 8, 1943, and of the replies thereto; and upon further consideration of the record in the above-entitled proceeding:

It is ordered, That the said proceeding be, and it is hereby, reopened for reconsideration.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 552] INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 4394

PASSENGER FARES OF HUDSON & MANHATTAN RAILROAD COMPANY

Decided August 3, 1943

Upon reconsideration, conclusion in report on further hearing that a proposed local passenger fare of 10 cents for use on the downtown line of the Hudson & Manhattan Railroad Company had not been justified, but that a fare of 9 cents had been justified, modified in part by a-thorizing an alternative-fare basis of 11 tokens for $1, or a cash fare of one dime, for application during the remaining period of the war and 6 months thereafter. Prior reports, 227 I. C. C. 741, 255 I. C. C. 649.

Appearances shown in the report on further hearing.

REPORT OF THE COMMISSION ON RECONSIDERATION

PORTER, *Commissioner:*

In the report on further hearing, 255 I. C. C. 649, decided June 8, 1943, hereinafter called the prior report, we reached

the conclusion that a proposed passenger fare of 10 cents for local application on the downtown line of respondent Hudson & Manhattan Railroad Company had not been justified, but that a fare of 9 cents, instead of the present fare of 8 cents, had been justified for use during the remaining period of the war and 6 months thereafter. We modified our conclusions in the original report, 227 I. C. C. 741, accordingly.

Upon petition of respondent for reconsideration and modification of the findings made in the prior report, to which protestants replied, the proceeding has been reopened for reconsideration. Respondent states in its petition that it is impracticable to collect a 9-cent fare as authorized by us without causing serious public inconvenience and depletion of its revenues, and that modification of our findings in the prior report is necessary in order to permit practicable compliance therewith. Accordingly, it asks that the following conclusion in our report:

> We further conclude that an increased local fare of 9 cents on respondent's downtown line has been justified, for application during the remaining period of the war and 6 months after its termination,

be modified so that it will read:

> We conclude that an increased local fare on respondent's downtown line has been justified on the basis of alternative fares of 11 tokens for one dollar, or a cash fare of 10 cents, payable only by a dime. These proceedings are held open for application by any party for further consideration, by reason of changed conditions, of the fares so authorized.

Respondent further asks that such modified findings and the authority accorded thereby be conditioned upon a reduction in the present fare of 10 cents on its uptown line by making such tokens, at the rate of 11 for $1, applicable [fol. 553] also on that line, the cash fare to continue at 10 cents, payable only by a dime. Pending the procurement of the necessary tokens and the making of the required alterations in the fare-collection boxes, respondent asks authority to charge on both its uptown and downtown lines a cash fare of 10 cents, payable only by a dime. The petition is grounded upon certain additional statements of

fact, supported by an affidavit of the chairman of respondent's board of directors, which are summarized below.

The fare-collection boxes which have long been used by respondent consist of a concave receiving basin in which there are a number of holes through which pennies, nickels, dimes, and quarters pass into a glass-encased case and then through a chute and past a baffle plate to an inspection belt, which moves the coins to a position where they can be observed by the attendant, after which the coins drop into a receptacle constituting a part of the counting mechanism in the box. A revolving plate selectively separates the coins in the collecting receptacle and passes them through a counting device, which visibly records the amount of money passing through it, after which the coins drop into removable coin-collecting can which, upon removal becomes automatically sealed.

The capacity of the coin receptacle and the selection and counting mechanism in these fare boxes is limited, and the number of fares which they can receive, select and count depends upon the number of coins and the rate at which they are deposited therein. The minimum number of coins which any passenger can deposit in the boxes under the present 8-cent fare on the downtown line is 4 and the maximum number is 8. Under a cash fare of 9 cents the minimum number would become 5 and the maximum 9. During the approximately 3 hours of peak traffic about 60,000 passengers pass through the Hudson Terminal station alone each week day. Passengers pass fare boxes at a rate as high as 3 per second. Under the present 8-cent fare repeated stoppages of the fare boxes have occurred by overloading the receptacle associated with selector plate and counting mechanism. Experiments have shown that the increased number of coins, which could be used to pay a 9-cent cash fare would so exceed the capacity of the receptacle, selection, and counting devices as to cause frequent stoppages and consequent serious delay to the traveling public, particularly to passengers wishing to connect with trains of the Pennsylvania Railroad Company at Newark, N. J., and Exchange Place, Jersey City, N. J., of the Erie Railroad Company at Erie Station, Jersey City, and of the Delaware, Lackawanna & Western Railroad Company at Hoboken, N. J. Such stoppages and detention of passengers would require waiting trains, which during peak-traffic periods must operate on a 3-minute schedule, with a

90-second headway through the tunnels, to depart only partially filled, while succeeding trains would be inadequate to accommodate the accumulated traffic.

When a stoppage of the fare-box mechanism occurs, it is necessary for a skilled mechanic to clear it so as to restore it to service or to replace it with another. Due to war conditions there is a critical scarcity of such skilled mechanics, but even if this were not so, such stoppages results in the detention of passengers waiting to pass the fare boxes. Investigation has disclosed to respondent that not only are no other appliances or facilities presently available to it which would render feasible the collection and counting of a 9-cent cash fare, but there is no device which, under mass transportation conditions, will collect and count multiple-cash fares requiring the use of more than four coins.

Respondent states that it is not feasible to use either single or multiple-trip tickets because fare boxes cannot be adapted to effect the necessary mutilation thereof so as to prevent their reuse, nor can it use commutation tickets for this traffic because the examination and punching of such tickets, or the identification of the holders thereof, either at congested station entrances or on crowded [fol. 554] trains is impracticable during the peak-travel hours. Moreover, the sale of such tickets and the inspection, examination, and cancellation thereof would require a large expansion of personnel and facilities, with a consequent increase in operating expenses beyond those contemplated in the prior report. Respondent insists, therefore, that the only practicable method by which it may collect and retain a substantial portion of the additional revenues to which we have found it is entitled is by the use of alternative fares limited to tokens and dimes.

It is, however, impracticable to limit token fares for use only on respondent's downtown line. This is so because there is no way by which it can determine whether a passenger entering a station in New Jersey intends to use the uptown or the downtown line, and any passenger would be able to enter a New Jersey station by depositing a token. At present all eastbound passengers entering New Jersey stations deposit 8 cents in coins. Passengers traveling to the Hudson Terminal on the downtown line, having fully paid the 8-cent fare, leave that station without further payment. Passengers traveling to Manhattan stations on the uptown line are required to deposit 2 cents in coins in fare

boxes at the station of exit, thereby paying the remainder of the present 10-cent fare in effect on that line. If the use of tokens as proposed by respondent were restricted to patrons of the downtown line, and the 10-cent fare were continued as now on the uptown line, these facilities for collecting upon exit the balance of the fare would have to be retained at the uptown stations. Also, if a passenger intending to use the uptown line should pay a dime upon entering a New Jersey station, respondent would be compelled to issue to such passenger an exit coupon which would permit him to leave an uptown station without further payment. This would require the passenger to indicate to the farebox attendant at the New Jersey station that he was depositing a dime and not a token, and that he was entitled to such an exit coupon, thereby retarding the entrance of other passengers at that fare box. Moreover, it would be difficult to police the proper issuance and use of such free exit coupons, and respondent fears that it might thereby be subjected to the loss of substantial revenue. Accordingly, respondent is willing to reduce its local fare on the uptown line and suffer a reduction in its revenue therefrom in order to make practicable the use of its proposed token fares, and to avoid the disastrous results which it fears would attend any attempt to collect a cash fare of 9 cents.

The use of token fares on boths its lines will reduce the revenue which respondent might reasonably expect to earn under the findings in the prior report. In 1941, the latest full year for which the results were before us at the time of that report, the number of downtown local passengers was 31,726,773. In 1942 that figure increased to 33,620,045, and in the first six months of 1943 to 19,385,723 or, adjusted to an annual basis, 38,771,448 for 1943. An increase of 1 cent in the fare paid by those passengers, assuming that no diversions would occur by reason of the increased fare and that a 9-cent fare could be collected, would result in additional revenue per year of $387,714. Upon investigation, respondent believes that if the proposed alternative token and cash fares were established about 90 percent of the passengers would use tokens and about 10 percent would use dimes. Based upon that assumption, it estimates an annual revenue gain on the downtown line of $458,208 and a reduction on the uptown line of $153,605, or a net gain

of $304,603, which is $83,111 less than its estimated gain under a 9-cent cash fare if such a fare were collectible.

The sale of tokens in lots of not less than 11 for $1, respondent submits, would serve the convenience of the public by making it unnecessary for passengers to purchase tokens more frequently than about once a week or to obtain any small change in making such purchases. The sale of tokens in lots of less than 11 would require an increase in respondent's facilities and personnel in order to handle [fol. 555] more frequent sales and to meet complicated change requirements, which would result in inconvenience to and delay of passengers in obtaining tokens and change, and would increase respondent's operating expenses. Such tokens would afford passengers material advantages over the use of individual commutation tickets in that they would not be limited to use as to time nor restricted to use by the purchaser only, but could be used at any time and by any member of the purchaser's family or by others.

Certain governmental priority authorizations will be required for the use of strategic metals contained in the proposed fare tokens, and there will be some delay in making the dies, processing the metal, and in obtaining an adequate supply of the tokens. The alteration of the fare-box mechanisms and devices so they will handle only tokens and dimes will also require governmental priorities for the required metals, and it will take some time to manufacture the necessary parts and thereafter to install them for use. Respondent estimates that it will require at least 90 days or until early October to obtain tokens and to alter the fare boxes. In the meantime it asks for authority to charge a uniform cash fare on both of its lines of 10 cents, payable only by a dime, with the understanding that it will exercise the utmost diligence in putting into use the alternative token and dime fares.

In support of its request for this interim authority respondent points to the fact that our order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, authorized it to increase its downtown fare to 9 cents and its uptown fare to 11 cents. For the reasons stated in the prior report, respondent did not avail itself of that authority and elected to petition for reopening of the instant proceeding. But if it had availed itself of that authority and it had been practicable to collect the increased fares, respondent would have earned additional

gross revenue from February 1, 1942, when the increased fares might have been made effective, to June 30, 1943, of about $750,888, assuming that no diversions of any consequence would have occurred by reason of such a fare increase. Moreover, had it been practicable to collect the 9-cent fare on its downtown line as authorized by us in the prior report respondent would have earned, and its downtown passengers would have paid and would continue to pay, about $1,000 a day more than they are now paying. Since respondent must forego that additional revenue until such time as, upon our authority, the alternative fare basis now proposed can become effective, it urges that it is only just and equitable for it to be permitted to charge in the interim a uniform cash fare of 10 cents.

In our conclusions in the prior report we limited our authority for the application of the increased 9-cent fare to the remaining period of the war and 6 months after its termination. We pointed out that conditions were abnormal, that the war contingency reserve of $240,000 per year set aside by respondent, which represents the greater portion of its increased operating costs since 1941, is wholly attributable to a condition which may be expected to be eliminated after the war, and that that amount is greater than the additional revenue which we anticipated would result from the increased fare therein approved. Respondent now urges that presumably when that limitation upon the use of the 9-cent fare was made we could not have had in mind the facts shown in the instant petition with respect to the impracticability of collecting that fare in cash, and that it would not be justified in making the substantial capital expenditures and radical changes in its fare structure on both of its lines if such changes are to be of a temporary nature only. It submits that there is no sound basis upon which anyone can undertake to prophesy what will be the economic and competitive conditions affecting its traffic, either upon termination of the war or 6 months thereafter; that any attempt at such prophecy is mere speculation; and that without any such unwarranted speculation the rights of all interested parties hereto can be adequately protected by holding open this proceeding so as to permit any party [fol. 556] to apply for further consideration of the fares herein authorized upon any change in conditions either preceding or following the termination of the war.

Protestants' replies. The New Jersey protestants in their reply urge that the "effectiveness of the decision dated June 8, 1943, should be indefinitely suspended" and the proceeding set for further hearing or the petition denied in its entirety. The Director of Economic Stabilization and the Director of Price Administration, hereinafter sometimes collectively referred to as the Price Administrator, in their reply urge that we should continue the existing 8-cent fare or at most order fares not in excess of 3 for 25 cents, and that in any event before the fare is permitted to be increased as suggested by respondent a further hearing should be held.

Both of the replies are devoted largely to an exposition of reasons for denying respondent's requests for authority to charge a cash fare of 10 cents on its downtown line pending establishment of the proposed alternative basis and for elimination of that portion of the prior conclusions which limited our approval of the 9-cent fare to the remaining period of the war and 6 months thereafter. Since our findings and conclusions herein accord with the desires of protestants in that respect, those reasons need not be here recited.

The New Jersey protestants state that our prior findings took into account, among other things, the possibility of improved revenue by means of increased operating economies; that the use of alternative token and dime fares applicable to both of respondent's lines would simplify its fare structure and accounting; and that the resulting operating economies which would thus be reflected in its revenue position, as well as the economies which would be brought about by the elimination of the fare-collection facilities for the use of interstate passengers at the uptown stations, have been entirely ignored in the petition. We have given consideration to such economies in reaching our modified conclusions herein.

All of protestants appear to regard the proposed application of the same fare basis on the downtown line as on the uptown line to be in conflict with our observation in the previous reports herein that "from the standpoint of the cost of the service to respondent, * * * as well as of the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown serv-

ice must be something less than 10 cents." Nothing in that expression, however, may be interpreted to mean that the spread between the uptown and downtown fares might not be narrowed or eliminated by a voluntary reduction in the uptown fare to the basis of the maximum reasonable downtown fare as found by us. If it had been practicable to do so and respondent had taken advantage of the authority given in *Increased Railway Rates, Fares, and Charges, 1942, supra,* most likely its fares would now be 11 cents uptown and 9 cents downtown. Without passing upon the reasonableness of the uptown fare, for of course it is not here in issue, for the purpose of this proceeding we must regard the maximum reasonable uptown fare to be 11 cents, and the alternative fares now proposed by respondent for the downtown line will, of course, be "something less than" 11 cents.

The Price Administrator urges that respondent has not availed itself of other methods of collecting the authorized 9-cent fare, such for example as the use of paper tickets sold at one for 9 cents or 3 for 25 cents. Under such a method all interstate passengers boarding trains in New Jersey would be required to deposit a ticket instead of the present 8 cents. Aside from the relatively unfavorable revenue results which would be entailed by the sale of 3 tickets for 25 cents, such a scheme would be impracticable, first, because a substantial number of such tickets could and probably would be reused, and second, the delay to passengers which would result during the rush-hour period from the purchase of individual tickets and of 3 tickets for [fol. 557] 25 cents would quite certainly disrupt respondent's operations to such a degree as to divert many patrons from its line.

Our attention is called by the Price Administrator to certain testimony at the further hearing by one of respondent's witnesses to the effect that, among other reasons for not taking advantage of our authority in *Increased Railway Rates, Fares, and Charges, supra,* to increase its interstate local fares, was "the fact that, with the existing fare-collection facilities of petitioner, it is probable that it would, in many instances, be unable actually to collect fares of 9 cents and 11 cents in full." This protestant urges that since such testimony was before us at the time of the prior decision and the 9-cent fare was nevertheless found to be reasonable,

respondent should not now be further heard on its claim that maintenance of the latter fare would not be feasible.

Discussion and Findings. Apparently on the assumption that the local fare to be approved by us in the prior report for future use on the downtown line would be either the present fare of 8 cents or that proposed of 10 cents, none of the parties stressed the evidence of record with respect to the feasibility of collecting a cash fare of 9 cents, and it is now apparent that we failed to give to that evidence the weight to which it is entitled. For the reasons hereinbefore recited, we are convinced that the collection of a 9-cent fare in cash would be impracticable. We are satisfied, also, that neither strip tickets, because the reuse of some of them could not be avoided, nor commutation tickets, because their inspection by station attendants would entail too much delay to passengers during the rush hours, would be practicable for use by respondent's local interstate passengers. The substitute fare basis now proposed by respondent, however, with the alternative use of 11 tokens for $1 or a cash fare of a dime, has the advantage of being practical in that it can be conveniently used both by the public and by respondent if made applicable contemporaneously on both the downtown and uptown lines. The approximate use ratio of 90 per cent tokens and 10 per cent dimes which respondent believes will result, and which we may accept as a reasonable estimate, means that practically all of the regular local commuters on respondent's downtown line will use the tokens and thus pay an average fare of 9-1/11 cents, or about the same as we approved in the prior report. In addition, about 90 per cent of the uptown local interstate patrons, which in all will number about 18,774,000 in 1943, will obtain a reduction in their fare from 10 to 9-1/11 cents.

Certain of protestants suggest, although they do not urge, that an outlay of $1 at each purchase of tokens may prove to be a hardship upon some patrons and thus serve as a deterrent against their continued patronage of respondent's lines. We are not persuaded that the sale of these tokens in minimum lots of 11 will result in any material hardship, especially now that the average individual income is substantially above the pre-war level. The usual monthly commutation ticket used by the railroads in the New York metropolitan area costs at least five times as much as will the 11 tokens of respondent, and we have no reason to be-

lieve that the average income of the commuters on respondent's lines is materially different from that of numerous commuters on other railroads in the same area. Moreover, there can be no doubt that the sale of these tokens in packages of 11 for $1 will have a tendency to reduce detention of passengers to a minimum, first, by making unnecessary in most instances the handling of coins, and second, due to the odd number in each package, by causing the average commuter to make purchases at irregular intervals and at different stations. In the handling of mass transportation such as we are dealing with here, the latter consideration, while not controlling, is entitled to weight.

Under the proposed basis the occasional passenger will pay 10 cents on both of respondent's lines. In the prior report we found that the fares and charges of record for commutation service of carriers other than respondent serving the New York metropolitan area afford stronger sup- [fol. 558] port, differences in transportation services considered, for an 8-cent or a 9-cent fare than for a 10-cent fare on respondent's downtown line. That finding, however, was based upon a comparison between fares and services for commutation passengers and not for passengers who may ride only occasionally in commutation equipment. On the railroads generally the latter passengers do not ride on commutation tickets but on standard coach tickets, the price of which is subject to the minimum charge of 10 cents for all classes of rail passenger equipment approved by us in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 257. Upon the facts of record as adduced at the several hearings herein, we now find a fare of 10 cents to be reasonable for the occasional local interstate passenger on respondent's downtown line. As stated, for the purposes of this report, we must regard the maximum reasonable local interstate fare on the uptown line to be 11 cents.

Respondent's estimates as made in its petition of the probable revenue results, first, under a cash fare of 9 cents downtown, assuming that the latter were collectible and no changes were made in the present 10-cent fare uptown, and second, under the proposed basis on both the downtown and uptown lines, are based upon the further assumption, as stated, that no diversions of passengers would occur by reason of the increased downtown fare. Our estimate of probable revenue results under a 9-cent fare as made in

the prior report contemplated a diversion of about 5 per cent. Since the alternative basis now proposed will result in an average fare slightly higher than 9 cents it may safely be assumed, even if the proposed reduction in the average uptown fare should draw some additional traffic to that line, that the net diversion, if any, under the proposed fare basis will be no less than it would be under a practicable 9-cent downtown fare. This being so, we may accept as a fair approximation respondent's estimate of about $83,000 as its annual loss in gross revenue during the remaining years of the war under the fare basis now proposed compared with the revenue which it would have received if the 9-cent fare could have been put to practical use; and, giving due consideration, as the New Jersey protestants urge, to certain accounting and other economies which should result to respondent under the proposed fare basis, we are convinced that its probable net railway operating revenue in those years will be at least no greater under the proposed basis than it would have been under the basis contemplated by our prior findings.

The number of interstate local passengers carried on the downtown line in the first half of 1943, as shown in respondent's petition, adjusted to an annual basis, reflects an increase over 1941 of 18.2 per cent, compared with an increase of 12.7 per cent as estimated by us in arriving at the forecast of probable revenue results made in the prior report. The traffic or revenue results from respondent's railroad operations as a whole, however, for the first half of 1943 or for any other period subsequent to those for which the results were of record at the time of the prior report, are not before us, and we have no reason for believing that they vary substantially from the estimates employed in arriving at our forecast of respondent's probable net income available for bond interest as set forth in that report.

The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first 5 months of 1943. The "deficit" so shown is $75,798, and for the 12 months of the year would be $181,915, which according to this protestant, would leave available $1,203,635 for interest on the income bonds, equivalent to 4.34 per cent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 per cent, as we estimated would result from the

amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the "deficit" and other results given for the 5-month period are not for the railroad operations only, but also include the operation of respondent's terminal building, and there-[fol. 559] fore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior reports is based was closed.

The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate.

We are not impressed, however, with that portion of respondent's petition which would have us authorize the application of a cash fare of 10 cents on the downtown line until such time as tokens can be brought into use. For the reasons given in our prior report, we cannot find a local fare of 10 cents to be reasonable for general application on respondent's downtown line.

Nor can we accede to respondent's request that we eliminate that portion of our prior findings which limits the authority therein granted to the remaining period of the war and 6 months thereafter. Our approval of the general increase in the standard passenger fares authorized in *Increased Railway Rates, Fares, and Charges, 1942, supra*, has been so limited. The capital expenditures and the changes in its fare structure which respondent will make by reason of the fare basis herein approved are, of course, matters which it may urge upon us in a petition for reopening at or after the termination of the war.

Conclusions. Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been

justified for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line.

Our prior conclusions and order, to the extent that they are in conflict herewith, are hereby modified accordingly. No order is necessary.

MILLER, *Commissioner*, concurring in part:

I concur in the findings of the majority only insofar as they afford relief from the requirements imposed in the prior report on further hearing. For reasons stated in my prior expressions in connection with this proceeding, I am still of the opinion that the record amply justifies a finding that the proposed fare of 10 cents for application on respondent's downtown line, in the manner proposed by it, would be reasonable and lawful for the services performed and that no sufficient reason has been given for limiting the time during which the proposed fare shall remain in effect.

I am authorized to state that Commissioners Mahaffie and Patterson join in this expression.

Commissioner Aitchison did not participate in the disposition of this proceeding.

By the Commission. W. P. Bartel, Secretary. (Seal.)

[fol. 560] PLAINTIFF'S EXHIBIT "6"

Before the Interstate Commerce Commission, Investigation and Suspension Docket No. 4394

Passenger Fares of Hudson & Manhattan Railroad Company

Petition of Hudson & Manhattan Railroad Company for Reconsideration and Modification of the Findings made by the Commission in its Report on Further Hearing Herein Dated June 8, 1943

Because it is impossible for petitioner, Hudson & Manhattan Railroad Company, to collect a 9-cent cash fare on its downtown line, as authorized by the Commission's findings in its report on further hearing of June 8, 1943, without causing serious public inconvenience and depletion of revenue, petitioner is compelled to ask reconsideration of such findings, and such modification of them as is necessary merely to permit practicable compliance by petitioner with those findings.

Petitioner asks such modification even though it involves a reduction of petitioner's present 10-cent fare on its uptown line, and furthermore involves, pending such modification, the foregoing by petitioner of more than $1,000.00 per day additional revenue.

Accordingly, petitioner asks:

1. That the Commission modify its findings in such report that—

> "We further conclude that an increased local fare of 9 cents on respondent's downtown line has been justified, for application during the remaining period of the war and six months after its termination.";

so as to find that—

> "We conclude that an increased local fare on respondent's downtown line has been justified on the basis of alternative fares of eleven tokens for one dollar or a cash fare of 10 cents, payable only by a dime. These proceedings are held open for application by any party for further consideration by reason of changed conditions, of the fares so authorized."

2. That such modified findings and the authority and permission accorded thereby be expressly conditioned on the reduction by petitioner of the local interstate fare on its uptown line to the extent of making such tokens, sold on the basis of eleven for one dollar, applicable as an alternative fare on said uptown line to the present cash fare of ten cents, such present cash fare thereafter to be payable only by a dime.

3. That, pending the procurement by petitioner of the necessary tokens and the making by petitioner of the necessary alterations of its fare collection boxes to handle and count such tokens and dimes, petitioner be authorized to charge both on its downtown line and its uptown line a cash fare of ten cents, payable only by a dime, such permission to be conditioned upon petitioner's using the utmost diligence to obtain such tokens and to make such alterations of its fare collection boxes at the earliest possible moment.

The grounds of this petition, which are supported by the affidavit of Walter F. Brown, Chairman of the Board and President of the petitioner, annexed hereto and made a part hereof, are as follows:

[fol. 561] I

The physical limitations of the fare collection boxes used by petitioner make it impossible for petitioner to collect and count a 9-cent cash fare on petitioner's downtown line without causing serious public inconvenience through stoppages and detentions of passengers. Such stoppages and detention would reduce the volume of traffic, which petitioner would be able to handle, thereby defeating the Commission's purpose in granting such 9-cent fare, and, in addition, endangering the ability of petitioner to render to the public essential rapid transit service. Under present war restrictions no more efficient fare collection appliance or device is available, nor can the present fare collection boxes be substantially modified. Moreover, petitioner, after extensive investigation, is informed that there is no device which, under mass transportation conditions, will collect and count multiple cash fares requiring the use of more than four coins.

During peak traffic periods passengers pass fare collection boxes at a rate as high as three per second. Any attempt to collect a 9-cent cash fare by means of such fare collection boxes would result in the repeated clogging of the counting mechanism and suspension of the operation of such boxes. In order to clear the collecting devices it would be necessary to prevent passengers from entering while such devices were being restored to operating condition or were replaced. Any clearance would be temporary, and repeated such stoppages would be necessary. While the rate of flow of passengers passing fare collection boxes could be reduced, this would result in the detention of passengers waiting to pass such boxes, and in the mounting accumulation of passengers so detained. Such detentions would result in serious inconvenience, particularly to passengers desiring to make connections with trains of the Pennsylvania Railroad at Newark and Exchange Place, with trains of the Erie Railroad at Erie Station, Jersey City, and with trains of the Lackawanna Railroad at Hoboken. Any attempt at repeated stoppages or detentions of passengers would undoubtedly result in disorder. Stoppage or detention of passengers also would mean that waiting trains would depart partially filled, while succeeding trains would be inadequate to handle the accumulated traffic. Trains now operate during peak traffic periods on a three-minute schedule, with a ninety-second headway through the tunnels. It would be impossible to hold trains or to supply supplemental ones.

Thus it is obvious that an attempt to collect a 9-cent cash fare might well involve the breakdown of a concededly vital and heavily burdened war transportation facility, thereby depriving the public of essential rapid transit service and the petitioner of needed revenue. The reality of these objections is so apparent that petitioner, pending further consideration by the Commission, has felt compelled to forego any attempt to collect a 9-cent cash fare on its downtown line, even though petitioner thereby is losing more than $1,000.00 per day additional revenue which such fare was intended to provide.

II

Petitioner can, within a short time, adapt its present fare collection boxes to receive, handle, and count fares payable only by tokens and dimes.

III

Petitioner cannot practicably use either single or multiple trip tickets or commutation card tickets (a) because petitioner's fare collection boxes cannot be adapted to make the necessary mutilation of such single and multiple trip tickets so as to prevent their re-use, and (b) because the examination and punching of commutation tickets or the [fol. 562] identification of the holders thereof either at congested station entrances or on crowded trains is wholly impracticable during the peak travel hours. Moreover, the sale of such tickets, and the inspection, examination, and cancellation thereof, would require such an expansion of personnel and facilities, with consequent increase in operating expenses, as would prevent petitioner from earning a substantial portion of the additional revenue which the Commission finds the petitioner should have and which the Commission has attempted to provide.

IV

It is wholly impracticable to limit token fares to use on petitioner's downtown line only. There is no way by which petitioner can determine whether a passenger entering a station in New Jersey intends to use its uptown line or its downtown line. Any passenger would be able to enter a New Jersey station by depositing a token. If petitioner should retain its present 10-cent fare on its uptown line as its only fare on such line, petitioner also would have to retain on its uptown line its facilities for collecting upon exit the balance of such 10-cent fare. Moreover, an additional complication would be presented if a passenger intending to use the uptown line should pay a dime upon entering a New Jersey station. Petitioner then would have to issue to such passenger an exit coupon which would permit him to leave a station on its uptown line without payment of any additional fare. This would require such passenger to indicate to the fare collection box attendant at the New Jersey station that he was depositing a dime and not a token, and was entitled to a coupon permitting him to exit at a station on the uptown line without additional payment, thereby necessarily retarding the entrance of other passengers at such fare collection box. It would be extremely difficult to police the proper issuance and use of such free

exit coupons and petitioner might be subjected to the loss of substantial revenue.

Therefore, notwithstanding the fact that the use of token fares on petitioner's uptown line will result in a reduction of petitioner's present uptown fares and revenues, petitioner is willing to suffer such reduction in order to make such token fares practicable, and to avoid the disastrous results which would attend any attempt to collect a cash fare of 9 cents on its downtown line. The application of token fares which will be good on both lines necessarily will reduce the total revenues which petitioner might earn under the Commission's present findings authorizing the collection of a 9-cent cash fare on its downtown line. As shown by the tabulation attached to the affidavit, petitioner, under a 9-cent cash fare on its downtown line, would earn additional gross revenues of $387,714.48 per annum on the basis of passenger traffic for the first six months of 1943, were it possible to collect such fares without serious impairment of petitioner's service to the public. With a uniform use on both its uptown and downtown lines of alternative fares of eleven tokens for one dollar or a cash fare of a dime, petitioner, on the same basis, would earn additional gross revenues of only $304,603.25 per annum, assuming that 90% of its passengers purchased token fares and the remaining 10% paid cash fares of a dime, an assumption which petitioner's investigation indicates to be reasonable. It is apparent, therefore, that the use of alternative token and dime fares applicable both to petitioner's uptown and downtown lines will yield petitioner revenues approximately $83,000 less per annum than contemplated by the Commission's present findings applied to petitioner's present traffic.

The use of alternative token and dime fares applicable to both petitioner's downtown and uptown lines will, moreover, be a convenience to the public and will simplify petitioner's fare structure and accounting.

[fol. 563]

V

In order to prevent still further incursion upon the revenues which the Commission has found petitioner needs and which the Commission's findings intended to accord petitioner, it is necessary that such tokens be sold in lots of not less than eleven for one dollar. The sale of tokens on this basis will serve the convenience of the public by making it

unnecessary for passengers to purchase tokens more frequently than once a week or to obtain any small change in making such purchases, and also will minimize the increase in operating expenses incident to the additional station personnel which petitioner will have to provide.

The sale of tokens in lots of less than eleven for one dollar would require a large increase in petitioner's facilities and personnel to handle more frequent sales and to meet complicated change requirements, all of which would result in inconvenience to and delay of passengers in purchasing tokens and in obtaining change, and in substantially increased operating expenses to petitioner.

VI

Petitioner, by selling eleven tokens for one dollar, will afford passengers material advantages over the use of individual commutation tickets.

The fare tokens proposed to be sold by petitioner would not be limited to use as to time nor would they be restricted to use by the purchaser only, but could be used at any time, on either the uptown line or the downtown line, by the purchaser, by any member of his family, by friends or even by strangers. Multiple trip transportation tickets usable by a person other than the purchaser, as sold by other carriers, are limited as to period of use and are sold at a price substantially in excess of the customarily restricted personal commutation tickets, which are limited to use by the purchaser only within a limited period.

VII

Since it is not practicable for petitioner to collect a 9-cent cash fare on its downtown line, petitioner in incurring a loss in excess of one thousand dollars per day in revenue, which the Commission has found the petitioner needs and which the Commission's findings intended to accord to petitioner. Moreover, if petitioner had published fares of 9 cents on its downtown line and 11 cents on its uptown line, which the Commission's report on further hearing expressly finds petitioner could have established, effective February 1, 1942, pursuant to the Commission's order in Ex Parte 148, petitioner would have received and petitioner's passengers would have paid $750,887.66 additional revenue from such date up to June 30, 1943.

Because of present war restrictions, petitioner will necessarily incur some delay in obtaining fare tokens and in making the necessary alterations of its fare collection boxes. Petitioner believes that until such time as it can, with utmost diligence, obtain tokens and alter its fare collection boxes to receive and count only tokens and dimes, which time petitioner estimates will require at least 90 days, it is only just and equitable that the Commission authorize petitioner to establish and collect, during the intervening period, a cash fare of 10 cents, payable only by a dime, on its downtown line and also on its uptown line.

The authorization of a cash fare of 10 cents on the downtown line during such period will serve merely to compensate petitioner partially for the loss of revenue to which, according to the Commission's report on further hearing, petitioner was entitled since February 1, 1942 under the Commission's order in Ex Parte 148, and to prevent the continuing loss by petitioner of revenue in excess of one thousand dollars a day which the Commission intended to accord petitioner by its present findings authorizing a 9-cent cash fare on the downtown line.

[fol. 564]

VIII

As a corollary to the application to petitioner's uptown and downtown lines of alternative fares payable by tokens or dimes, it will be necessary, for practical reasons, for petitioner to obtain uniform divisions from the Pennsylvania Railroad applicable to interline traffic on the uptown and downtown lines. In view of the admonitions of the Commission, both in its original report and in its report on further hearing, that a substantial portion of the increased revenues needed by petitioner should be obtained from the Pennsylvania Railroad by increased divisions of fares on interline traffic, petitioner undertakes to seek as promptly as possible not only uniform divisions from the Pennsylvania Railroad on interline traffic, but such increased divisions as shall be adequate in view of changed conditions.

IX

The Commission, by its findings in its report on further hearing, has limited the application of the increased fare of 9 cents accorded on petitioner's downtown line to the re-

maining period of the war and six months after its termination. Petitioner respectfully submits:

(a) That presumably when the Commission made such limitation it could not have had in mind the facts shown in this petition demonstrating that it is not practicable for petitioner to collect any substantial portion of the increased revenues which the Commission's findings intended to accord petitioner, without making radical changes in petitioner's fare and division structures and in its methods of collecting and accounting, and without incurring substantial capital expenditures in connection therewith;

(b) That petitioner would not be justified in making such capital expenditures and radical changes on the basis of such merely temporary increase in the fare on its downtown line;

(c) That even on the record on further hearing before the Commission at the time it so limited such increased fare, such limitation was not justified.

While petitioner, in its petition for reopening of these proceedings, indicated that among its reasons for not publishing fares of 9 cents and 11 cents on its downtown and uptown lines, respectively, under the authority of the Commission's order in Ex Parte 148, was the impracticability of collecting such fares, petitioner's evidence on further hearing in this respect (Tr. 1125-27) was confined to its reasons for not publishing such fares under that order. Petitioner had no occasion on such further hearing to present all the facts set out in this petition showing that it is not practicable to collect a 9-cent cash fare on its downtown line, since no such fare was at that time in issue.

It would appear, moreover, that the basic ground upon which such limitation on the 9-cent fare is imposed by the Commission's report on further hearing is itself founded upon a misapprehension of fact. That report states, sheet 17—

"Increases in rates or fares based upon abnormal conditions of a transitory nature should not be made permanent. *The greater portion of respondent's increased operating costs, namely, the war emergency*

reserve of $240,000 per year, is wholly attributable to a condition which may be expected to be eliminated after the war, * * *."

The record before the Commission upon further hearing shows that petitioner's operating expenses increased $204,936, 1941 over 1937, (Exhibit B), despite a decrease in traffic of 12,142,568 passengers (Exhibit 36 R [a], sheet 1). Using the formula accepted on further hearing by all par- [fol. 565] ties, the 1941 operating expenses, therefore, adjusted to the basis of 1937 traffic would have been $383,778. To this must be added $226.500 per annum representing the annual basis of increased labor costs incurred in 1942. This would make a total of $610,278 adjusted increased operating expenses which, prior to the further hearing, already had been incurred over 1937, exclusive of the $240,000 war contingency reserve and exclusive of any increase in taxes. The increase in taxes, 1941 over 1937, was $71,825 (Exhibit B), and, as is shown at sheet 15 of the Commission's report on further hearing, there has been a further increase in taxes, 1942 over 1941, of $60,130. While it is true, therefore, that such war contingency reserve of $240,000 per annum presumably will expire with the termination of the war, such reserve obviously does not represent, as stated at sheet 17 of the Commission's report on further hearing, "the greater portion of respondent's increased operating costs," but only 22.2% of its total adjusted increased operating costs prior to the further hearing, and only 26.02% of such adjusted increased operating costs plus increased taxes.

Petitioner submits that there is no sound basis upon which either the Commission or anyone else can undertake to prophesy what will be the economic and competitive conditions affecting petitioner's traffic either upon the termination of the war or six months thereafter; that any attempt at such prophesy is mere speculation; and that, without any such unwarranted speculation, the rights of all parties in interest in these proceedings can be protected adequately by holding these proceedings open for application by any party for further consideration of the fares to be authorized by the Commission pursuant to this petition, because of any change in conditions either following the termination of the war or preceding such termination.

X

Based on the facts set forth in this petition and in the supporting affidavit which is a part hereof, and because of serious continuing loss by petitioner of vitally needed revenues which the Commission intended that petitioner should earn under an increased fare of 9 cents on petitioner's downtown line, petitioner asks that this petition be determined speedily; that, to permit this to be done, any party to these proceedings who may be opposed to the granting of this petition be required to file a verified reply thereto within ten days; and thereupon that the Commission, upon the basis of this petition and any such reply or replies, without further hearing, forthwith determine the issues thereby presented.

Petitioner further asks that on such determination the Commission authorize petitioner to publish and charge, upon not more than five days' notice to the public, an interim cash fare of 10 cents payable only by a dime, on both petitioner's downtown and uptown lines, until such time as petitioner can obtain the necessary tokens and make the necessary alterations in its fare collection boxes, and further authorize petitioner, upon the acquisition of the necessary tokens and the making of the necessary alterations of petitioner's fare collection boxes, to publish and charge uniform alternative fares of eleven tokens for one dollar or 10 cents, payable only by a dime, applicable both to petitioner's downtown and uptown lines, likewise upon not more than five days' notice to the public.

Dated, New York, N. Y., July 8, 1943.

Hudson & Manhattan Railroad Company, By Walter F. Brown, *Chairman of the Board and President.*

John E. Buck, Thomas A. Halleran, John F. Finerty, Cravath, de Gersdorff, Swaine & Wood, *Of Counsel.*

[fol. 566] State of New York,
County of New York, ss:

Walter F. Brown, being first duly sworn, deposes and says that he is the Chairman of the Board of Directors and President of the petitioner, Hudson & Manhattan Railroad Company; that he has read the foregoing petition and knows the contents thereof; that the facts stated therein, and the following additional statements of fact in support

of and supplemental to said petition, are based on careful investigation and studies made by him or under his direction, and are true to the best of his knowledge and belief.

I

Revenues Already Lost and Continuing to Be Lost by Petitioner

As shown by the tabulation set forth in Exhibit I annexed to and made a part hereof, petitioner carried 33,620,045 passengers on its downtown line and 17,117,029 passengers on its uptown line, or a total of 50,737,074 passengers on both lines during the calendar year 1942. 46,316,086 of such passengers were carried between February 1 and December 31, 1942. As also shown by Exhibit I, petitioner carried 19,385,723 passengers on its downtown line and 9,386,957 passengers on its uptown line, or a total of 28,772,680 passengers, during the first six months of 1943. If petitioner had established, and had been able to collect, fares of 9 cents and 11 cents on its downtown and uptown lines, respectively, effective February 1, 1942, as the Commission has found petitioner was entitled to establish under the Commission's order in Ex Parte 148, petitioner would have received 1 cent more per passenger or $750,887.66 additional gross revenues from the 75,088,766 total number of passengers carried by it on both lines between February 1, 1942, and June 30, 1943.

As also shown by Exhibit I, the increased fare of 9 cents on the downtown line, which the Commission's present findings authorize petitioner to charge, would result in $387,714.48 additional gross revenue per annum to petitioner, or additional revenue at the rate of $1,062.23 per day, on the basis of the number of local passengers carried on the downtown line during the first six months of the year 1943.

II

Reasons Why a 9-Cent Cash Fare On the Downtown Line Is Impracticable

A. Petitioner's Present Local Fares and Divisions, and Facilities and Methods of Collection.

Petitioner's presently authorized fares are as follows:

8 cents between stations in New Jersey and Hudson Terminal, New York, on its downtown line;

10 cents between stations in New Jersey and stations in New York on its uptown line;

5 cents between stations in New Jersey; and

5 cents between stations in New York City on the uptown line.

The divisions presently paid to petitioner by the Pennsylvania Railroad Company on interline traffic are as follows:

[fol. 567] 5 cents for certain passengers transported by petitioner between Hudson Terminal, New York, and Exchange Place, Jersey City, New Jersey;

7.64 cents for certain passengers interchanged with the Pennsylvania Railroad at Exchange Place, Jersey City, New Jersey, and for all passengers to and from Hudson Terminal, New York, using the joint rapid transit train service between Hudson Terminal, New York, and Newark, New Jersey;

8.64 cents for all joint passengers to and from stations on petitioner's uptown line, including passengers interchanged with the Pennsylvania Railroad at Exchange Place, Jersey City, New Jersey.

Petitioner collects all fares for local interstate and intrastate transportation on its lines by the deposit of cash in fare collection boxes at station entrances as follows:

All eastbound passengers entering stations in New Jersey deposit 8 cents in coins in fare collection boxes at station entrances. Passengers traveling to Hudson Terminal, New York, on petitioner's downtown line, having fully paid the present 8-cent fare, leave that station without further payment. Passengers traveling to stations on petitioner's uptown line in New York City, are required to deposit 2 cents in coins in fare collection boxes at the station of exit, thereby paying the remainder of the present 10-cent fare applicable on the uptown line.

All westbound passengers entering Hudson Terminal Station, New York, deposit 8 cents in coins in the fare collection boxes at station entrances. All westbound

passengers entering stations in New York City on the uptown line deposit 10 cents in coins in fare collection boxes. All such passengers, having fully paid the present interstate fares, leave destination stations in New Jersey without further payment.

New Jersey intrastate passengers are required to deposit 8 cents in coins in fare collection boxes at station entrances and the attendants at such boxes issue to them a refund coupon which is redeemed for 3 cents when presented to agents at destination stations in New Jersey within thirty minutes from the time of issue.

New York intrastate passengers making a northbound trip between stations from Christopher Street to 33rd Street, New York, on the uptown line pay 5 cents to agents at station entrances and pass through turnstiles which register such fares, and are issued a coupon permitting them to exit at destination station in New York without further payment. New York intrastate passengers making a southbound trip between stations from 33rd Street to Christopher Street, New York, on the uptown line, are required to deposit 10 cents in coins in the fare collection boxes, and at destination stations in New York have issued to them by the gateman at the exits a refund coupon which is redeemed for 5 cents by the agents at such station entrances.

The methods by which petitioner accounts and obtains payment for transportation on its lines of interline passengers exchanged with the Pennsylvania Railroad Company are set forth in the testimony of John J. Fritsch, Comptroller of petitioner, at pages 1749-90 of the transcript of the record on further hearing herein.

B. Description of Fare Collection Boxes

The fare collection boxes now and for many years past used by petitioner consist of a concave receiving basin in which there are a number of holes through which pennies, nickels, dimes, and quarters pass to and into a glass enclosed case down and through a chute and past a baffle plate to an inspection belt which moves the coins to a position where they can be observed by the attendant, after which such

coins drop into a receptacle constituting a part of the counting mechanism in such boxes. A revolving plate selectively separates the coins in the collecting receptacle, and passes [fol. 568] them through a counting device, which visibly records the amount of money passing through it, after which the coins drop into a removable coin collecting can which, on removal, becomes automatically sealed.

The capacity of the coin receptacle, selection, and counting mechanism in the fare collection boxes is limited, and the number of fares which can be received into, selected, and counted depends upon the number of coin units and the rate at which they are deposited in fare boxes. The greater the number of coins used to pay one fare the less is the capacity of the counting device and associated receptacle in terms of the number of fares that can be handled by the boxes. Therefore, fares payable only in single units, such as a token or a dime, increase the capacity of the counting mechanism and the rate at which passengers may pass fare collection boxes.

The minimum number of coins which any passenger can deposit in the fare collection boxes under the present 8-cent fare on petitioner's downtown line is four, made up of a nickel and three pennies, and the maximum number is eight, consisting of eight pennies.* Under a cash fare of 9 cents on petitioner's downtown line, the minimum number of coins which can be used to pay fares becomes five, consisting of a nickel and four pennies, and the maximum number becomes nine, consisting of nine pennies, or an increase of 25% and 12½%, respectively, in the number of coins required to be received into, selected, and counted by the mechanism and devices in such fare collection boxes.

A recent investigation shows that during the hours of peak traffic passengers pass fare collection boxes at a rate as high as 3 every second. Under the present 8-cent fare on the downtown line there have been repeated stoppages of the fare collection boxes, occasioned by overloading the receptacle associated with the selector plate and counting mechanism. Experiments have shown that the increased number of coins which may be used to pay a 9-cent cash fare

---

* While the deposit of 8 pennies is relatively infrequent, it undoubtedly contributes to the stoppages of fare collection boxes which even now occur under the present 8-cent fare.

on the downtown line will so exceed the capacity of the receptacle, selection, and counting devices in such fare collection boxes that consequent stoppages will cause serious delay to the traveling public, particularly to passengers desiring to make connections with trains of the Pennsylvania Railroad at Newark and Exchange Place, with trains of the Erie Railroad at Erie Station, and with trains of the Lackawanna Railroad at Hoboken.

When a stoppage of the fare box mechanism occurs it is necessary for a skilled mechanic to clear the same so as to restore it to service or to replace such box, either of which requires an appreciable length of time. In either case, passengers are detained while such clearance or replacement is made. Investigation discloses that not only are there no other appliances, methods, or facilities presently available to petitioner which will make it possible for petitioner to collect and count such 9-cent cash fare, but that there is no device which, under mass transportation conditions, will collect and count multiple cash fares requiring the use of more than four coins. Due to war conditions there is a critical scarcity of skilled mechanics who are experienced in clearing and adjusting such fare box mechanisms, and, even were skilled mechanics now available, the stoppage of fare boxes necessarily would result in an accumulation of passengers waiting to pass the boxes.

Petitioner is advised that the devices and appliances in such fare collection boxes for receiving, selecting, and counting coins can be altered in approximately 90 days so as to be adapted to receive, select, and count only tokens and dimes. Careful investigation and study has shown that the only practicable method by which petitioner may collect and retain any substantial portion of the additional reve-[fol. 569] nues which the Commission has found petitioner needs and is entitled to enjoy, is by the use of alternative fares limited to tokens and dimes, thereby reducing the quantity and variety of units required to be received into, selected, and counted by the mechanism in fare collection boxes.

III

The Desirability of Establishing Uniform Local Fares on the Downtown and Uptown Lines and of Obtaining Uniform Divisions from the Pennsylvania Railroad Company on Interline Traffic

The petition sets forth the reasons why it is necessary that uniform fares, payable only in tokens or in dimes, be established for both the downtown line and the uptown line of the petitioner, even though such uniform fares require the reduction of the present 10-cent fare on petitioner's uptown line. The establishing of such uniform fares necessarily requires that petitioner obtain from The Pennsylvania Railroad Company uniform divisions on all interline traffic in order to correlate the ascertainment of the amount of such divisions with the method of collecting uniform fares from local passengers, thereby greatly simplifying the method of accounting for and obtaining payment of divisions on such interline traffic.

IV

Time Required to Obtain Tokens and to Alter Fare Collection Boxes

Investigation and study disclose that fare tokens generally considered most desirable contain strategic metals, the use of which is subject to governmental restrictions entailing delay in manufacture, because of the necessity for obtaining appropriate priority authorizations. Further delay is entailed in making the dies and processing the metal required for such tokens, as well as in obtaining an adequate supply of such tokens.

The alteration of the mechanisms and devices in petitioner's fare collection boxes to handle only tokens and dimes also will require governmental priorities for the requisite metals. The manufacturer of such boxes will require time to make the necessary parts, and petitioner will require a short time to install them after they are made.

Investigation discloses that petitioner will require at least 90 days to obtain the tokens and to alter its fare collection boxes.

V

Propriety of Authorizing a Cash Fare of 10 Cents, Payable Only by a Dime, Applicable to Both Downtown and Uptown Lines of Petitioner, Until Tokens Can Be Procured

Exhibit I, annexed to and made a part hereof, shows that if it were practicable to collect a cash fare of 9 cents on

the downtown line, petitioner would have received $336,200.45 additional gross revenue if such fare had been in effect during the year 1942, and that petitioner would receive additional gross revenue at the rate of $387,714.48 per annum under such cash fare, on the basis of passenger traffic for the first six months of the year 1943. That exhibit also shows that petitioner would earn additional gross revenue [fol. 570] at the rate of $304,603.25 per annum under uniform alternative local interstate fares on both its downtown and uptown lines of tokens sold to its patrons in lots of eleven for one dollar or cash fares of one dime, on the basis of passenger traffic for the first six months of 1943 and assuming that 90% of such passengers purchase tokens and that 10% pay cash fares of a dime, an assumption which investigation discloses is reasonable.

As shown in paragraph I hereof, had petitioner published fares of 9 cents and 11 cents on its downtown and uptown lines, respectively, effective February 1, 1942, which the Commission's report on further hearing finds petitioner legally was entitled to do under the Commission's order in Ex Parte 148, petitioner would have earned and its passengers would have been required to pay $750,887.66 additional for transportation since February 1, 1942.

Furthermore, were it practicable for petitioner to collect the 9-cent fare on its downtown line authorized by the Commission's findings in its report on further hearing dated June 8, 1943, petitioner would have earned and its passengers would have paid and would continue to pay in excess of $1,000.00 per day more for transportation service. Since petitioner must forego such additional revenue until such time as the Commission shall authorize the collection of uniform alternative fares payable in tokens or in dimes on both its downtown and uptown lines, the establishment of which will thereafter involve a reduction of petitioner's revenue from its uptown line of $153,604.77 per annum on the basis of traffic on that line for the first six months of 1943, affiant believes that until petitioner can obtain the necessary tokens and make the necessary alterations of its fare collection boxes, it is only just and equitable that the Commission should authorize petitioner to charge in the interim a uniform cash fare of 10 cents, payable only in dimes, on both its downtown and uptown lines, on not more than five days' notice to the public. Petitioner will under-

take to use the utmost diligence to obtain the necessary fare tokens and to make the necessary alterations of its fare collection boxes so as to collect uniform fares of tokens or dimes at the earliest possible moment and thereupon to publish, in lieu of the interim cash fare of 10 cents, such alternative fares of tokens or dimes applicable to both the downtown and uptown lines of petitioner on the shortest notice to the public which the Commission will authorize.

Walter F. Brown.

Subscribed and sworn to before me, this 8th day of July, 1943. Adolph M. Lindenstruth, Notary Public, Westchester County. Certificate filed in New York Co. No. 60, New York Register's No. 4147, Comm. Expires March 30, 1944.

[fol. 571]

EXHIBIT I

Hudson & Manhattan Railroad Company

Kind of Traffic	1942—12 Mos. Number of Passengers	% of Total	1943—6 Mos. January to June Number of Passengers	% of Total
Passengers				
Interstate—Local				
Downtown Line	33,620,045	45.9	19,385,723	46.3
Uptown Line	17,117,029	23.4	9,386,957	22.4
Intrastate—Local				
New York	354,617	0.5	204,487	0.5
New Jersey	2,105,669	2.9	1,208,034	2.9

	Actual Revenue	1942—12 Mos. 9c. Fare Downtown	Gain in Revenue
Revenue			
Interstate—Local			
Downtown Line	$2,689,603.60	$3,025,804.05	$336,200.45
Uptown Line	1,711,702.90	.....	.....

	1943—6 Months Adjusted to 12 Months Basis			
	Number of Passengers	Present Fares	9-Cent Fare Downtown	Gain in Revenue
Revenue				
Interstate—Local				
Downtown Line	38,771,448	$3,101,715.84	$3,489,430.32	$387,714.48
Uptown Line	18,773,916	1,877,391.60	.....	.....

[fol. 572] EXHIBIT I—Continued

Hudson & Manhattan Railroad Company

1943—6 Months Adjusted to 12 Months Basis

Petitioner's Proposal	90% Tokens 11 for $1.00 10% Cash 10-Cent Fare	Present Fare Basis	Gain in Revenue	Net Gain
Revenue				
Interstate—Local				
Passengers				
Downtown Line				
34,894,303	$3,172,209.36	.....	.....	.....
3,877,145	387,714.50	.....	.....	.....
38,771,448	$3,559,923.86	$3,101,715.84	$458,208.02	.....
Uptown Line				
16,896,534	$1,536,047.63	.....	.....	.....
1,877,392	187,739.20	.....	.....	.....
18,773,916	$1,723,786.83	$1,877,391.60	R$153,604.77	$304,603.25

Passengers Carried February 1, 1942 to June 30, 1943

	Downtown	Uptown	Total
Year ended 12/31/42	33,620,045	17,117,029	50,737,074
January 1942	2,984,127	1,436,861	4,420,988
Eleven Mos. 2/1 to 12/31/42	30,635,918	15,680,168	46,316,086
Six Mos. 1/1 to 6/30/43	19,385,723	9,386,957	28,772,680
	50,021,641	25,067,125	75,088,766
Additional Revenue	$500,216.41	$250,671.25	$750,887.66

R—Indicates red figure.

Certificate of Service

I hereby certify that I have this day served the foregoing petition upon all parties of record in these proceedings, by mailing a copy thereof, properly addressed to each party of record.

Dated at New York, N. Y., this 8th day of July, 1943.

JOHN F. FINERTY.

[fol. 573] PLAINTIFF'S EXHIBIT 7

Before the Interstate Commerce Commission

I. & S. Docket No. 4694

Passenger Fares of Hudson & Manhattan Railroad Company

Reply of Protestants to Petition of Hudson & Manhattan Railroad Company for Reconsideration and Modification of the Findings Made by the Commission in Its Report on Further Hearing Herein Dated June 8, 1943

Based upon a verified petition by Walter F. Brown, Chairman of the Board of Directors and President of the

Hudson & Manhattan Railroad Company, the respondent herein, Hudson & Manhattan Railroad Company, requests a modification of the report on further hearing dated June 8, 1943, to permit the assessment of a 10-cent fare on its downtown line for an alleged temporary interim period.

The request is made allegedly because it is impossible for petitioner, Hudson & Manhattan Railroad Company, to collect a 9-cent cash fare on its downtown line, as authorized by the Commission's findings in its report on further hearing dated June 8, 1943, without causing serious public inconvenience and depletion of revenue.

This allegation, in turn, is based upon further allegations that the fare-collection boxes presently used are unable to handle a 9-cent cash fare without mechanical failures, and that such mechanical failures would result in serious delay to the traveling public, with consequent loss of revenue by reason of the fact that a portion of the traveling public would seek other means of transportation rather than submit to such delay and inconvenience.

It is held out, further, by petitioner that it is its intention, at some future time, to make such mechanical adjustments in the fare-collection boxes as will permit the mechanical handling of tokens and dimes, to secure tokens for general use in connection with interstate cash fares on its lines, and subsequently to sell such tokens at the rate of 11 tokens for $1.00, the use of which is to alternate with a cash fare of 10 cents. It is proposed to permit the use of tokens on the uptown line, which would result in the rate of fare on the uptown line becoming 11 rides for $1.00 whereas, under the present fare on the uptown line, interstate, 11 rides cost $1.10.

The respondent proposes to use diligence in reducing the interim period during which a 10-cent cash fare would be in effect on the downtown line and makes reference to a period of approximately 90 days. However, it is admitted by petitioner that fare tokens considered desirable for use would contain strategic materials, the use of which is subject to governmental restrictions, entailing delay in manufacture as well as delay in making the dies and processing the material required for such tokens, and, further, that the period of 90 days during which devices and appliances in fare-collection boxes could be made is based on advice. There is no proof that such objectives could be attained [fol. 574] within 90 days and there is, likewise, no proof

that the utmost diligence to obtain such tokens and to make such alterations of its fare-collection boxes at the earliest possible moment would be of any avail to the petitioner.

In the interim, the downtown passengers would be subjected to fares and charges which obviously would be unreasonable. Such unreasonable treatment is attempted to be mitigated by the petitioner by the assertion that it could have collected a cash fare of 9 cents on its downtown line and a cash fare of 11 cents on its uptown line since February 1, 1942, instead of the fares of 8 and 10 cents, respectively, and that it thereby has made a donation to the traveling public for which it now reasonably might be compensated. It must not be overlooked that the only reason respondent did *did* not collect fares of 9 and 11 cents, downtown and uptown, respectively, since February 1, 1942, was its desire to endeavor to permanently impose a fare of 10 cents on the downtown line. It was that desire which led to the respondent's former petition for further hearing and for leave to publish and charge a 10-cent fare on the downtown line by reason of alleged changed conditions, based upon which the proceeding was reopened for further hearing.

Respondent further states that it knew, on February 1, 1942, that it would be inconvenient for it to attempt to collect a cash fare of 9 cents on the downtown line and respondent now alleges that that fact is of no materiality because a cash fare of 9 cents on the downtown line never was in issue before this Commission.

If respondent's premises with respect to the situation obtaining on February 1, 1942, be correct, which protestants do not admit, and if the amount of respondent's revenue were to be variable, dependent upon the amount of the residue which would be left for interest on its funded debt, it is the position of protestants that the respondent already has failed in due diligence in not being presently in a position to handle any cash fare decided upon as proper by this Commission, without sacrifice of revenue and serious delay and inconvenience to the traveling public.

It is proposed by respondent that the findings of the report herein, dated June 8, 1943, be further modified to state that these proceedings are held open for application by any party for further consideration of the fares so authorized, by reason of changed conditions, that is,

authorized in the modified manner now requested by the instant petition. It is the position of protestants that a 9-cent fare on the downtown line was granted by the Commission solely in sympathy with the order of January 21, 1942, in *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, and protestants likewise assert that such increased fare of 9 cents on the downtown line otherwise was unjustified. This position, we believe, is substantiated by the statement on sheet 16 of the report of June 8, 1943, that under normal conditions the saturation point in increased fares on the downtown traffic was reached at 8 cents. Further, by the affirmation by that report of the fact that it would be unreasonable to expect the entire burden of revenue increase to be borne by the downtown local passenger and that a substantial portion thereof should be sought through increased divisions on the inter-line traffic.

Respondent's request for modification of the findings of the report of June 8, 1943, is, in effect, a formal request for a reopening of the proceedings and a new set of findings based upon assertions which protestants would have no opportunity to test or verify. The unusual nature of such request is evidenced by the petitioner's statement appearing on pages 11 and 12 of the petition, by means of which petitioner asks that that petition be determined speedily and that, to permit this to be done, any party to these proceedings who may be opposed to the granting of this petition be required to file a verified reply thereto within ten days and, thereupon, that the Commission, upon the basis of the petition and any such reply or replies, without further hearing forthwith determine the issues thereby presented.

[fol. 575] It is obvious that protestants could not meet these conditions, particularly inasmuch as there is dangled before the interested public an intimation of a reduction in the fare on the uptown line at some future and undetermined time. The finding of the Commission in the report of June 8, 1943, herein, was based on the overall picture which took into account not only the revenue requirements and the convenience of the Hudson & Manhattan Railroad Company but also the probabilities of other sources of revenue, as well as the possibility of improved revenue status by means of operating economies and increased operating efficiency.

The petition of respondent very definitely indicates, for example on page 6 of the petition, that the use of alternative token and dime fares applicable to both of petitioner's lines, downtown and uptown, would simplify petitioner's fare structure and accounting, thus resulting in operating efficiency and economy which would be directly reflected in its revenue position. Furthermore, the use of tokens on the uptown branch, even at the rate of 9 cents per token or 11 tokens for $1.00, would eliminate entirely the fare-collection facilities at the uptown stations for interstate passengers and would result in other economies, the effect of which on the revenue position of respondent is entirely ignored by the petition.

Furthermore, the petition, while designed to appear simple and apparently lay before the Commission a mere mechanical operating difficulty which would result from compliance with the findings of the order of June 8, 1943, goes far beyond that point and endeavors to obtain a completely modified and amended set of findings without adequate substantiation in the record. For example, on page 11 of the petition, petitioner discusses the merit of the finding of the June 8th decision, which limited the effectiveness of that decision to the duration of the war and six months thereafter. Respondent, throughout the petition, insists that the modified order requested could protect the rights of all parties in interest in these proceedings by merely stating that the proceedings are open for application by any party for further consideration because of any change in conditions.

There are many conditions which would and could be changed merely by granting the modifications requested by the petitioner, which would warrant further consideration and which would have an important effect upon the revenue situation of the respondent. For example, we have findings of the Commission, of record in this proceeding, that, regardless of the measure of the fare on the uptown line, the measure and character of the downtown service warrant a lower fare on the downtown line. Another condition is that the petition of the respondent states, for the first time, that the respondent intends to heed the admonition that it should look for increased revenue from the interline divisions, but, at the same time, states the objective of the respondent to be to obtain uniform divisions on interline traffic on both the uptown and downtown lines.

While respondent also specifically states that such increased divisions would be sought as would be adequate in view of changed conditions, heretofore it has been the position of the respondent that it could not even approach the connecting lines on the divisional questions where the changed conditions were associated with any fare reduction. How, then, is the divisional position of the respondent to be affected by the changed condition brought about by a reduction in the fare on the uptown line and the consequent equalizing of fares on both the downtown and uptown lines?

The foregoing, we believe, conclusively demonstrates that it would be neither fair nor reasonable to grant the petition of respondent in its present form, which would require different fares for different periods of time, without some specific idea of what conditions may be anticipated in the future, when certain proposed changed fares would be effective.

Secondly, it would be impossible for protestants to sub- [fol. 576] mit a verified statement, within ten days, which could adequately cover all of the broad topics sought to be resolved in favor of respondent solely by means of the petition.

It is the position of protestants that the petition should be denied, that the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by the respondent, that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied.

Respectfully submitted, Frank Hague, Mayor. Charles A. Rooney, Corporation Counsel. Charles Hershenstein, Ass't Corporation Counsel for The City of Jersey City, N. J. Michael Joseph Bruder, Corporation Counsel for Town of Harrison, N. J. John N. Platoff, Corporation Counsel for Township of Weehawken, N. J. Nicholas S. Schloeder, Corporation Counsel for Township of North Bergen, N. J. James C. Agnew, Corporation Counsel for The City of Union City, N. J. Irwin Rubenstein, Town Attorney for Town of West New York, N. J. John J. Fallon, Corporation Counsel. James A. Coolahan, Ass't Corporation Counsel for

The City of Hoboken, N. J. Theodore C. Baer, 1 Exchange Place, Jersey City, N. J. for Various Bus Lines Operating in Hudson County, N. J. S. S. Eisen, 140 Cedar Street, New York 18, New York, for Protestants.

July 14, 1943.

[fol. 577] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties to this proceeding by mailing a copy thereof, with postage prepaid, to each party of record. Dated at New York, New York this 13th day of July, 1943.

S. S. Eisen, For Protestants.

[fols. 578-579] PLAINTIFF'S EXHIBIT "8"

Interstate Commerce Commission

Order

At a General Session of the Interstate Commerce Commission, held at its Office in Washington, D. C., on the 18th day of September, 1943

Investigation & Suspension Docket No. 4394

Passenger Fares of Hudson & Manhattan Railroad Company

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,

It is ordered, That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission.

It is further ordered, That this proceeding be assigned for such further hearing before Examiner Koch in the Commission's Offices at Washington, D. C., on September 28, 1943, at 10:00 o'clock A. M.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 580] INTERVENOR'S EXHIBIT "2"

Before the Interstate Commerce Commission

Passenger Fares of Hudson and Manhattan Railroad Company

Investigation and Suspension Docket No. 4394

Reply of Economic Stabilization Director and Administrator of the Office of Price Administration to Petition of Hudson and Manhattan Company for Reconsideration and Modification

Part I

Petitioner's Proposed Modification of the Commission's Order of June 8th Should be Rejected

(I) Granting petitioner's request would result in:—

(A) Discrimination as between uptown and downtown passengers.

(B) Excessive fares to downtown riders, and an

(C) Unwarranted waste of critical war materials.

Also

(D) No assurance is given that token program can be realized.

(II) Petitioner can, but has not availed itself of other methods of collecting the presently authorized 9 cent fare, which methods have all the claimed advantages, but none of the disadvantages of the company's proposal.

(III) Petitioner's request that the 9 cent fare be made permanent is completely refuted by this Commission's find-
[fol. 581] ing that the transitory nature of the abnormal

war conditions necessitates the use of temporary rates. And petitioner has introduced no new data that would invalidate that conclusion.

(IV) This Commission, in view of the large increases in net income, over that estimated in the modified order of June 8, 1943, should, upon petitioner's motion for reconsideration, order the continuation of the 8 cent fare.

[fol. 582]

Part II

Argument

Petitioner fails to establish a valid reason for the proposed modification of the order of June 8, 1943. In essence, petitioner argues:—Since the 9 cent fare is impossible to collect for technical reasons, the only solution is a metallic token system with tokens selling at 11 for $1 and single rides for a dime,—this applying to both uptown and downtown riders. This system of fares will result it is claimed in revenue below that obtainable at the 9 cent and 10 cent fare for the downtown and uptown divisions, respectively. It will take at least 90 days to place such a system in operation, and hence a 10 cent flat fare should be charged during that interval. Petitioner also claims that the above facts were not before the Commission, since the 9 cent fare was not an issue in this case, but had the Commission had all these "facts" in mind, it would not have set the 9 cent fare, nor set it for a temporary period.

The remainder of this brief will be devoted to demonstrating the erroneous and untenable character of the above allegations.

(I) Granting petitioner's request would result in excessive and discriminatory rates, as well as in the waste of critical war materials.

(A) The proposed schedule of fares will result in discriminatory rates.

We can do no better, in this respect, than to quote this [fol. 583] Commission's opinion both in the original report (page 754), and in the report of June 8, 1943 (Sheet 10).

"From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the

service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service, *the reasonable fare for the downtown service must be something less than 10 cents.*" (Emphasis supplied)

Petitioner has not introduced one piece of proof, or even allegation, to indicate that factors in either the cost or the value of the service have so changed since June 8, 1943, as to invalidate the above ruling. Thus on this basis alone, if no other, the proposed scheme must be rejected as resulting in unfairly discriminatory rates.

(B) The proposed schedule of fares will result in excessive rates.

Petitioner admits that its proposal will result in increased fares to riders on the downtown division, i.e., fares in excess of 9 cents per ride. This increase amounts to $70,494 per year, on the basis of 1943 data. However, petitioner contends that this excess revenue will be more than overbalanced by the decrease in revenue resulting from decreased fares to uptown riders. This contention is fallacious. Low rates to uptown riders do not help downtown riders to pay their fares. It is always so with discriminatory rates,—one group pays too much so another may pay less.

Exhibit #1 of the company's petition shows the calculation "proving" this allegation. It is obvious from that exhibit itself, that this alleged loss in revenue, in the amount [fol. 584] of $83,000, is based entirely on the assumption that 90% of both uptown and downtown riders will avail themselves of the 11 tokens for $1, the remainder paying the 10 cent cash fare. Accepting this assumption without admitting its validity, let us look at the facts.

Petitioner states that it "will require at least 90 days to obtain the tokens and to alter its fare collection boxes." It may take considerably longer. In fact, petitioner does not wish to be held to that 90 days, but only promises to "* * * use the utmost diligence to obtain the necessary fare tokens and to make the necessary alterations of its fare collection boxes * * *" But during this interim, which allegedly will take at lease 90 days, petitioner wants to collect a 10 cent cash fare from all of its passengers, uptown and downtown. On the basis of the company's own estimate, a 1 cent difference in fare on the downtown line means

over $1000 in revenue per day. Thus petitioner asks this Commission to approve a fare-collection scheme which will yield the company at least $90,000 in excess of what it is entitled to under the existing one-month old order! Petitioner estimates a "loss" of revenue of $83,000 for one year's operation under the proposed scheme. It is obvious that the "bonus" of at least $90,000 the company wants during the 90 day waiting period, overbalances the alleged "loss" of $83,000. On net balance, and on the basis of the company's assumptions, petitioner will net at least $7000 more than under the presently approved rates. It is hardly realistic to call this a "loss" in revenue.

[fol. 585] Thus we see that on the basis of the company's own assumption, it will increase revenue above that obtainable under the existing Commission order. But just how valid is petitioner's assumption that 90% of its customers will buy the tokens at a price of 11 for $1. Petitioner claims that it is " • • • an assumption which investigation discloses to be reasonable." Petitioner does not even present a hint as to what this "investigation" might have been. In fact we find it pretty difficult to conceive of a thorough investigation along those lines. Petitioners "reasonable assumption" seems like nothing but a guess. We venture to suggest that it is a bad guess in view of the recent finding by the Public Utilities Commission of the District of Columbia that the sale of 6 tokens for 50 cents entailed too heavy an outlay, and that the utility should sell 3 tokens for 25 cents.[1] If a 50 cent outlay, to save 10 cents, was found to be a bar to the sale of tokens, and that in a city with an exceedingly high average income, how much more of a deterrent will be a $1 outlay to save the same 10 cents. In view of this, an assumption that 90% of all riders will buy a dollar's worth of takens, seems subject to seriôus doubt.

We do not urge that a break-down other than 90%-10% is correct, but merely point out that petitioner bases a major part of its claim for modification upon a guess, which is probably not a good guess. Were we to assume that only 75% of all the passengers buy tokens at the price proposed

---

[1] Federation of Citizens' Associations et al. v. Capital Transit Co., Public Utilities Commission of D. C. Formal Case 309, Order No. 2278.

by petitioner, we would find that instead of "losing" $83,- [fol. 586] 000 on a year's operation, it will "lose" but $4,600; and if 74% bought tokens, the company would "lose" nothing on operations; *but in each case* the minimum bonus of $90,000 it wants to receive during the time it will take to set this scheme into operation, will more than overbalance these so-called "losses." To be perfectly realistic about this, petitioner will receive, at the end of a year's operation, *as a result of this scheme,* an *increased* revenue of *at least* $7,000, and much more probably in the neighborhood of the full bonus of $90,000.

C) The Proposed Scheme Will Result in A Waste of Critical War Material

The petitioner, which has already benefited as a result of the war by the improvement in its earnings, continues to take the position that while the stabilization legislation enacted by Congress may be necessary to win the war, and should be applied to the remainder of the country, that it is to have no application whatsoever to it. Not only does it seek entire and complete exemption from the national program keeping down the cost of living, but it also suggests that it be given authority to proceed with the use of strategic material and skilled technical labor, vital for the success of the war, for other than normal operations. There is an obvious shortage of such vital war resources. This is evidenced by the fact that "governmental priorities" will be required, and that it will take at least 90 days to do that which in normal times would require a much shorter period of time. We therefore submit that it may not be to the best interests of the war effort to switch over to a metal token system at this time.

[fol. 587] D) No Assurance That The Token Program Can Be Realized Has Been Given By Petitioner

On the basis of the record, the Commission should certainly reject the proposal of the company that it be permitted to institute a 10 cent fare for its downtown service until it is able to obtain Government approval for the metal token system, obtain the metal tokens, and work out the other details of the use of such tokens. No assurance has been given the Commission or the public that it can obtain such authority. No one knows whether it will take 90 days

or a year. Petitioner's earnings have already increased very substantially as a result of the war. The Company's request that it be allowed to put the 10 cent fare into effect without any typing limit or even for a period of 90 days, is entirely without justification and should be denied.

[fol. 588] II. Petitioner can, but has not availed itself of other methods of collecting the authorized 9 cent fare, which methods have all of the claimed advantages, but none of the disadvantages of petitioner's proposal.

A) One feasible scheme would be the use of paper tickets sold at one for 9 cents, or 3 for 25 cents.

Such fares would not exceed those found just and reasonable by this Commission. Since these tickets would be of paper, no critical metals would be used, and the scheme could be put into operation much more quickly. Such tickets need not be mutilated. The only purpose mutilation has is to prevent dishonest employees from reselling such tickets. Even this far-fetched possibility can be guarded against by the use of glass-top, slotted locked boxes. The control on the number of riders can be made at the booths where the tickets are sold.

The Company's suggestion that a token system necessitates equalizing uptown and downtown fares is just not so. A token system does not necessitate discriminatory rates. The alleged difficulties of charging different fares on the two divisions are highly unrealistic. There is no reason why the method now used by the company, a method used for many years, can not be continued. All interstate riders, boarding a train in New Jersey would deposit a ticket instead of the present 8 cent fare. Those alighting at the Cortland Street station (i. e. downtown riders) would pay nothing more. Passengers who use the uptown trains, would pay an additional 1 cent fare, instead of the present 2 cent fare.

[fol. 589] The tickets can be used for an indefinite period of time; by anybody; no time-consuming identification is necessary as for commutation passes.

Petitioner claims that the sale of 11 tokens for $1 will make it possible for a rider to purchase a week's supply at one time. This is not quite true, since the usual war-week requires 12 rides. However under the method here sug-

gested, a commuter can purchase a week's supply, i. e. 12 tickets for $1, and really have a week's supply.

It is apparent that the method here proposed has all the advantages claimed by petitioner for its scheme, but has none of the disadvantages of that scheme.

In any case, there is no good reason presented why petitioner should be allowed to charge a flat 10 cent fare until a feasible fare collection method is put into operation. The method we have outlined could have been put into operation by the company quite some time ago. The fact that petitioner would like, by one means or another, to collect *more* than this Commission has found reasonable, should not entitle the Company to a bonus by way of discriminatory and excessive rates.

We wish to emphasize that we do not suggest that the sale of tokens at 3 for 25 cents will result in fair and reasonable rates. We merely want to point out that petitioner's proposal is not the only solution, nor of alternative ones, the best solution. We shall subsequently show that the original 8 cent fare is now adequate.

[fol. 590] III. This Commission Has Already Found That the Transitory Nature of the Abnormal War Conditions Necessitates the Use of Temporary Rates and Petitioner Has Introduced No New Data That Would Invalidate That Conclusion

A) Petitioner's Claim That Even on the Record, the Rate Increase Should Have Been Made Permanent, Is Erroneous.

The modified order of June 8, 1943, amply refutes this erroneous claim of petitioner. There can be no doubt that the only reason for the present modification of the original order is the set of conditions that has arisen out of the war. Were it not for these, this Commission would have had no reason to disturb its original order. Petitioner's own listing of increased operating expenses clearly demonstrates their temporary wartime character. Thus on pages 10 and 11 of its petition for reconsideration the Company lists increased labor costs in 1942; increased taxes; a war contingency reserve (which so far has been barely touched, and that for a purpose entirely unrelated to the war); and increased operating expenses in general (although "1941 operating expenses—adjusted to the basis of 1937 traffic"

is a most peculiar method of estimating expenses). All these alleged increases are directly traceable to the war emergency. When that emergency ends, the particular factors which caused the above increases will also end. It requires no "prophecy" to see that. Should post-war conditions be such as to warrant the 8 cent fare—all well and good. However, should postwar conditions be such as to warrant some other fare there is nothing to prevent *any* [fol. 591] party from petitioning this Commission for a review of the situation. Whatever the situation may be, it certainly will not be the one existing now. Hence the Commission was perfectly warranted, on the record, to make this rate adjustment a temporary one. In fact this Commission would have been subject to valid criticism had it set permanent rates on the basis of obviously transient conditions.

B) Petitioner's Claim That This Commission Did Not Have Data Demonstrating the Technical Difficulty of Collecting the 9 Cent Fare, Since Such Fare Was Not an Issue in This Case, Is Contrary to Fact.

Petitioner's claim is amazing in view of the record. Section "e" of the Company's original petition for reopening deals solely with the difficulty of collecting the 9 cent fare. Thus Petitioner made the 9 cent fare an issue. But that was not all. On direct examination, Petitioner's President and Chairman of the Board testified as follows:

> A. "I should also add that a factor supporting the conclusion that fares of 9 cents on a downtown line and 11 cents on the uptown line were impracticable, is the fact that, with the existing fare collection facilities of petitioner, it is probable that it would, in many instances, be unable actually to collect fares of 9 cents and 11 cents in full."
>
> Q. "Nine cents and 11 cents in full?"
>
> A. "Yes, 9 cents and 11 cents in full. Mr. Examiner, I want to explain something. We have fare collecting boxes and we have a counting mechanism in them that collects the money and when you throw in a nickel and four pennies, you overtax the counting mechanism of [fol. 592] the boxes, and we are all of the opinion that we would not be able to do that. Say a half dozen men all come through the gate at the same time, and each

> one throws in a nickel and four pennies, it would so congest the boxes, that in our opinion, we would not be able to count the money by this automatic counting device * * *" (Tr. 1125).

And further on, upon being asked whether the present 8 cent fare does not cause the same congestion, the witness continued,

> A. "No, not as much. It congests it too much now and we have some difficulty as it is, but another coin would add, you can see, to the difficulty * * *."

Pages 33 and 34 of Petitioner's brief, dated October 24, 1942, deal in detail, and with many references to the transcript of testimony, to the alleged insufficiency of the 9 cent fare.

Thus the 9 cent fare was considered specifically in the Company's petition, was the subject of testimony by Petitioner's principal witness, and took up more than a page of Petitioner's brief. There is little doubt but that the 9 cent fare was an issue.

Petitioner admits that collection-box stoppages are nothing new that has developed since the close of the record. Evidence was presented to that effect. Thus it seems that this Commission had all the evidence on the 9 cent fare that Petitioner cared to present. Having for reasons best known to itself, presumably not put in *all* the minor details into the record,

Petitioner should not now be allowed to use an elaboration of an old issue, (hidden under the guise of a "new" [fol. 593] issue) as a reason for reconsideration and revision upward. As a matter of fact, Petitioner objected to the 9 cent fare on the record. Despite such objection (which we have herein shown to be groundless) this Commission ruled that on the information available to it, the 9 cent fare was reasonable. Petitioner presents nothing basic-ly new. The only new information is 5 month operating data, and *that*, as we will show warrants the continuation of the present 8 cent fare.

C. Petitioner's Claim That Had the Commission Known of the Large Capital Expenditure Necessary to Collect the 9 Cent Fare, It Would Have Made Such Fare Permanent.

There is not one word of proof or even allegations as to the size of this claimed "substantial capital expenditure." And even that broad generality is based on the unwarranted and herein-disproved assumption that a metal-token system is the only solution to the problem. The Commission knew of the alleged difficulties of collecting the 9 cent fare, and despite that, ordered that fare. We have shown how the difficulty can be easily and quickly overcome. In view of both of these facts, Petitioner's argument is clearly without merit.

[fol. 594] IV. This Commission, in View of the Large Increase in Net Income, Over That Estimated in the Modified Order of June 8, 1943, Should Upon Petitioner's Motion for Reconsideration Modify Its Order so as to Continue the Existing 8 Cent Fare

A) Petitioner's Net Income Under the 9 Cent Fare Will Far Exceed That Estimated by This Commission in Its Modification Order of June 8, 1943.

On Sheet 16 of such order this Commission said:

> "What has just been said makes it advisable to approximate the revenue results which may be expected if the downtown fare were made 9 cents. Assuming an increase in the 1941 downtown local traffic due to the war of 12.67%, a 5% diversion by reason of a 1 cent increase in the fare, and making due allowance for the reduced out-of-pocket expense because of such diversion, the resulting net income available for bond interest would approximate $2,404,502. After payment of the interest on the first two bond issues, this would leave for application on the income bonds $1,040,596, or at the rate of 4.420%."

Thus the Commission decided that those rates which yielded 4.42% on petitioner's income bonds, were just and reasonable rates. On the basis of the best information then available to the Commission, it found that a 9 cent fare on the downtown line would yield that result.

But now, a month after the Commission handed down its opinion, the company presents later data and requests a reconsideration on the basis of such data. We agree; the [fol. 595] Commission should reconsider the 9 cent fare. In

order to aid such reconsideration we attach herewith Exhibit A, based partly on data presented by petitioner in its Exhibit 1, and partly on information supplied by petitioner to Moody's and published by the latter.

As is evident from Exhibit A, the company did not earn during the first five months of 1943, full revenue bond interest by $75,798. Assuming that the five month deficit will continue proportionately, for the rest of the year, we find an annual deficit of $181,915. Total revenue bond interest requirements for 1943 are $1,385,550, hence by the end of 1943 petitioner will have available $1,292,486 for such interest; or at an interest rate of 4.34%. Thus *at the existing 8 cent fare* petitioner will earn substantially (within 8/100 of 1%) at the rate this Commission estimated petitioner would earn at the *9 cent fare*.

It is of interest to note that we assumed that the company would continue to operate at a deficit proportional to that of the first five months. It is obvious from Exhibit A that that deficit is decreasing very rapidly. This factor alone is enough to bring 1943 net earnings *above* the level deemed sufficient by the Commission.

If nothing else, Exhibit A indicates a strong presumption that the Commission should, on its own motion, review petitioner's current earnings. These earnings will undoubtedly show that petitioner is no longer in need of the 9 cent fare, and had petitioner heeded this Commission's now twice repeated admonition—

> [fol. 596] "• • • a substantial portion thereof (an increase in revenue) should be sought through increased division on the inter-line traffic • • •." (Sheet 17—Opinion of June 8, 1943.)

petitioner would now be earning enough to at least cover all bond interest, if not much more.

Petitioner's attitude on this question of division on interline traffic is peculiar. Every time it makes a request for a rate increase, it backs that up with, "If you grant our plea we'll try to get a better interline division;" the implication being, "If you don't we won't." This was the case in the original request for the 10 cent fare; it was the case in the recent further hearings; and it is the case in the present petition for reconsideration. The Commission should make it clear that petitioner is now ordered to now use all dili-

gence to obtain a modification of the interline division. It is now five years since the Commission had indicated that procedure. So far petitioner has "dignified" that order merely by considering it. It is high time it took some positive action.

[fol. 597]

Part III

Conclusion

The company has already profited considerably as a result of the war. In effect its position taken throughout this proceeding, is that the national stabilization legislation and program declared by Congress as essential for the winning of the war is not its concern, and that it need make no sacrifices of any kind to aid the government's program to keep down the cost of living. Now without having made any effort to comply with the Commission order permitting a substantial increase in its fares, it seeks a further increase and at the same time desires to make use of critical war materials though no showing has been made that it could not in fact comply with the Commission's existing order. We think it clear that the Commission should continue the existing 8 cent fare, or at most to order fares not in excess of three for 25 cents for the following reasons:

1) Petitioner's solution to the alleged difficulty of collecting the 9 cent fare will result in excessive fares, in discriminatory fares, and in the unconscionable waste of critical war materials;

2) Petitioner can avail itself of other fare collection methods, which have all the claimed advantages, but none of the disadvantages of petitioner's proposal;

[fol. 597a] 3) This Commission was entirely justified, and in fact obligated, to make the 9 cent fare temporary;

4) In view of current earnings of petitioner, this Commission should reconsider its authorization of the 9 cent fare with a view of continuing the 8 cent fare.

Hence, in view of the position expressed by Commissioner Eastman in his concurring opinion in Ex Parte 148, on rehearing;

> "* * * this is not a time when the making of corporate profits or even the increasing of individual income is entitled to any high place in our motives or thoughts.

The same is true of the recouping of peace-time deficiencies." (Sheet 39)

And in view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living.

In any event before the fares are increased on the basis suggested by the Company, a further hearing should be held.

Respectfully submitted, Fred M. Vinson, Economic Stabilization Director; Prentiss M. Brown, Administrator, Office of Price Administration; by George J. Burke, General Counsel; David F. Cavers, Assistant General Counsel; Harry R. Booth, Utilities Counsel; W. Russell Gorman, Attorney, Legal Department, Office of Price Administration.

Washington, D. C., July 17, 1943.

[fol. 597b] EXHIBIT A

Month		Deficit [1]
1943	January	$17,915
	February	36,087
	March	11,017
	April	5,707
	May	5,072
	Total	$75,798

1943—5-month deficit (Actual)	$75,798
1943 deficit (Estimated)	181,915[2]
1943 interest on income bonds = 27,711,000. × .05 =	1,385,550
1943 deficit	181,915
Available for Interest On Income Bonds	$1,203,635

Rate Earned On Income Bonds

1,203,635 ÷ 27,711,000 = 4.34%

---

[1] "Deficit" is defined as the amount by which the company failed to earn full interest on its income bonds.

[2] 75,798 × 12/5 = $181,915. This method of estimating a full year's operation from results of part of the year is the same as used by petitioner in estimating 1943 volume of traffic, in its Exhibit #1.

[fol. 597-c]. Certificate of Service

I hereby certify that I have served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each of their attorneys of record.

Dated at Washington, D. C., this 19th day of July, 1943.

Harry R. Booth, Utilities Counsel.

[fol. 598] Intervenor's Exhibit "3"

Before the Interstate Commerce Commission

Investigation and Suspension Docket No. 4394

Passenger Fares of Hudson and Manhattan Railroad Company

Exceptions of Prentiss M. Brown, Price Administrator, On Behalf of the Director of Economic Stabilization, to Report On Further Hearing Proposed by Examiner R. J. Trezise, and Brief in Support Thereof

March 8, 1943.

[fol. 599] Comes now Prentiss M. Brown, Price Administrator, on behalf of the Director of Economic Stabilization, and in the particulars hereinafter set forth specifically and respectfully takes exception to the report on further hearing proposed by Examiner R. N. Trezise:

Exceptions

1. Exception is taken to the failure of the proposed report to recognize that the question of divisions of rates under joint service is an issue in this proceeding.

2. Exception is taken to the failure to evaluate the effect of the proposed increase upon the volume of traffic.

3. Exception is taken to the proposed report which recognizes highly problematical future increases in operating costs as a justification for increased fares.

4. Exception is taken to the contradictory and insistent conclusions contained in the proposed report.

5. Exception is taken to the proposed report which infers that emergency transportation conditions resulting from the war are justification for forcing increased fares upon the passenger public.

6. Exception is taken to the failure to explain the reasoning which justifies a reversal of the earlier opinion and order.

[fol. 600] 7. Exception is taken to the misstatements and misconstructions of the brief of the Price Administrator.

8. Exception is taken to the general failure of the proposed report to evaluate the evidence.

[fol. 601] Exception Is Taken to the Failure of the Proposed Report to Recognize That the Question of Divisions of Rates under Joint Service Is An Issue in This Proceeding

In its earlier report in this matter (227 I. C. C. 741), which was upheld by the United States Supreme Court (313 U. S. 98), the Commission, in prescribing an 8-cent downtown fare in lieu of the 10-cent fare then requested, said at page 762:

> If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic.

In the proposed report, the examiner states (page 4):

> As previously stated, whether respondent is entitled to increased divisions of rates under the joint service with the Pennsylvania is not directly within the scope of this proceeding. There may be incalculable reasons, not in evidence, for the continuance of the present divisions.

Such conclusion is wholly at variance with the facts, and constitutes a summary reversal of the previous finding of the Commission, and that without evidence in support of such action.

Respondent sought the reopening of this proceeding because of its claimed need for increased revenues, which it states "can not be obtained except by the establishment of a fare of 10 cents on its downtown line" (Petition p. 18). The petition is clearly an indication that respondent feels

"impelled to seek a further increase in revenue," therefore, as contemplated by the Commission, "it should consider doing so on interline traffic."

In view of the Commission's previously expressed opinion, as quoted above, the respondent's request for addi- [fol. 602] tional revenues, the matter of divisions of rates on interline traffic obviously becomes an issue in this reopened proceeding. As an issue, it is not sufficient that the examiner find that respondent "has *dignified* the suggestion by serious consideration". (We have assumed it had the dignity generally accorded to utterances contained in formal Commission opinions.) The fact remains that respondent "declined to seek increased divisions of joint rates with the Pennsylvania, directly or through formal complaint".

Respondent seeks additional net revenues to meet its bond interest requirements. As a means of obtaining this end, it proposes to increase the fare on its downtown line from 6 cents to 8 cents. We believe the proposed report should determine: (1) Whether increased net revenues are needed by respondent; and (2) whether the increase in fare requested is the most proper means of obtaining such revenues.

At page 4 the examiner says:

> If the division of the downtown joint fare were increased 1 per cent the revenues therefrom would not meet respondent's annual deficits in interest on its bonds.

And at page 13 of the proposed report it is said:

> It is true that the fares for the joint service between the Pennsylvania and respondent were increased 10 percent under the general authority of the Commission in 1942, without an increase of 10 percent in divisions to respondent, but whether such an increase in divisions would be warranted or required upon an appropriate record is merely a matter of conjecture. It does appear, however, that a 10 percent increase in these divisions, which are calculated should yield $1,107,993, would be insufficient to meet the annual interest on respondent's bonds allocated to its property devoted to railroad use.

[fol. 603] The mere fact that there are insufficient grounds in the present record to justify a conclusion that additional revenues might be obtained from increased divisions is certainly no reason for such summary disposition of this important issue. It is self-evident that a sum of $1,107,993 would not meet interest requirements on that portion of the outstanding bonds allocated to railroad properties. But it is equally self-evident that the need for increased fares on the downtown line will be lessened to the extent that increased revenue is obtainable from interline divisions.

The examiner concludes that (page 4):

> There may be incalculable reasons, not in evidence, for the continuance of the present divisions.

This is indeed a novel thought. It is here suggested that the Commission should reverse its earlier opinion because of reasons *not in evidence.*

The basic factors concerning interline traffic are the same now as at the time of the Commission's earlier report *excepting that Pennsylvania's fares have been increased 10 per cent.* Certainly this change is no justification for the respondent's failure to follow the Commission's direction. Nor is it justification for reversal of the minds of the Commission as previously reflected.

Rather than dismiss the matter of divisions in this lighthearted manner, the report should find that respondent has been derelict in its duty, and also that this subject should be fully explored and spread upon the record so that a determination might be made as to the real and positive need for the requested increased fare. Since the record does not contain complete evidence on this subject, the report should find that the proposed fare has not been justified as necessary.

[fol. 604] This question was properly posed at page 754 of the earlier report of the Commission in this proceeding as follows:

> Admitting the need for increased revenue, two questions present themselves: First, is the proposed increased fare reasonable from the standpoint of the value of service to the public; and second, would it produce the needed additional revenue or would some other fare be more likely to produce the desired result? *In determining the latter question, consideration may*

be and should be given to whether any railroad service of respondent, other than the local downtown service, can be made to, and should be expected to, contribute some or all of the additional revenue needed. (Emphasis supplied.)

And this proposed report errs in not supplying the answers to these questions.

[fol. 605] Exception Is Taken to the Failure to Evaluate the Effect of the Proposed Increase upon the Volume of Traffic

As we have noted elsewhere herein, the proposed report contains few definite conclusions or specific findings as to facts in dispute in this case. Illustrative of this vacillation is the inability of the reader thereof to determine what conclusion, if any, the examiner reaches as to the effect of the proposed increase upon the volume of traffic, i. e., the diversion factor. This apparent failure is perhaps explained by the patent inability of the examiner to determine in retrospect the reasons for the lessening of traffic and respondent's downtown line between 1937 and 1941.

On page 5 it is said:

> • • • even with the diversion of traffic which resulted from the increase to 8 cents.

And on page 6:

> • • • assuming that under a 6-cent fare the diversion of passengers which was incident to the increase to the present 8-cent fare had not occurred.

These excerpts, and other statements on page 8 indicate that the examiner was clearly of the opinion that the increase from 6 cents to an 8-cent fare occasioned large diversions.

But again on page 6, it is said:

> Traffic decreased from 77,989,857 passengers in 1937 to 65,847,289 passengers in 1941, or 15.57 percent as previously indicated, resulting from a continuance of the same general factors which the Commission found in its original report were responsible for the reduction in the period from 1929 to 1937.

The "same general factors" which the Commission found responsible for the decline, did not, of course, include diversions resulting from fare increases. There were no increases between 1929 and 1937. So we must conclude that, [fol. 606] at this particular point, the examiner does not give recognition to the diversion which everyone else conceded to be a result of the increase to an 8-cent fare.

Perhaps, as we said, this inability to analyze past reactions to fare increases explains the failure to estimate the probable effect of the increase presently proposed. As we have noted elsewhere herein, the examiner dismisses protestants' diversion estimates as being "merely speculation of what the future might bring forth". Without hazarding even a guess as to the probable amount of diversion, which is basically essential to any estimate of future revenues under increased fares, the examiner says simply that (pages 10-20):

> Respondent is highly in need of revenue, and despite the possible percentage of diversion of passengers to other modes of transportation, calculated with varying estimates, it is sufficiently clear that additional net revenue would be obtained by the increase proposed, and respondent is here willing to assume the risk of the diversion of a percentage of traffic, contending with emphasis that the proposed increase would inevitably result in such increased net revenue.

Apparently this is intended to convey the thought that increased net revenues *must* result to respondent no matter what diversion may result. But the proposed report fails to resolve the dispute between protestants and respondent as to the matter of diversion. Such resolution is necessary to a proper estimation of the results which may accrue to respondent if its downtown fare is increased.

It is said here that (page 4):

> The conclusion in the original report that the proposed 10-cent fare would be unreasonable was based chiefly on the finding that "the revenue results to respondent, especially over an extended period of time, [fol. 607] would be more favorable under an 8-cent than under a 10-cent fare on the downtown line".

Yet, this proposed report, intended to completely overrule the original report, does not determine the fundamental

question whether diversion under the 10-cent fare will still be a percentage which would preclude respondent from gaining the net revenues it seeks. This fundamental issue was raised by the original report and the dissent thereto. It must be resolved before reversal of the original report is justified.

[fol. 608] Exception Is Taken to the Proposed Report which Recognizes Highly Problematical Future Increases in Operating Costs as a Justification for Increased Fares

The proposed report cites with apparent approval problematical increases in operating costs which respondent estimates it may incur at some future time, such as:

> Estimates that increases in wages will soon be applied to about 20 per cent of respondent's employees, aggregating approximately $226,500 per annum;
> Possible "indeterminable" increases in costs of material and supplies;
> Increases in Federal income taxes, and "perhaps" State taxes; and
> A nebulous thing called "operating costs for labor."

Certainly it is possible that operating costs may be increased at some future time. But we are not familiar with any law or interpretation which provides that such remote possibilities shall be given credence in determining rates. It is true that rates are fixed for the future, but not upon such extreme speculations as an unrendered decision of a court which may lead to imposition of higher taxes by the legislature. Such forecasting far exceeds the realm of speculation. These are conjectures unworthy of consideration.

Nor, as this Commission has said, should abnormal Federal income taxes serve as an excuse for the imposition of penalty fares. At 248 I. C. C. 545, 556, in the matter of *Increased Railway Rates, Fares, and Charges, 1942*, the Commission re-emphasized a previous holding in *Reduced Rates, 1922*, 68 I. C. C. 676, 683, to the effect that:

> [fol. 609] railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to en-

able it (them) to retain the designated fair return over and above the tax.

We have not heretofore considered the proper allowance of Federal income taxes as an issue in this proceeding, being of the opinion that respondent did not anticipate taxable profits even under the proposed rate. However, the interjection by the examiner of a question of Federal income taxes seems to anticipate profits, and revenues in excess of those required to meet current bond interest. If such taxes may conceivably become payable then, it would appear, the proposed report is based entirely upon false premises.

At page 12 it is said:

> Protestants concede that in addition to meeting the interest on bonds respondents should realize augmented sums to meet the contemplated operating expenses and taxes in 1943.

We have at no time made such concession, nor do we now. Therefore, if the designation "protestants" is intended to include this intervenor, this statement should be modified.

[fol. 610] Exception Is Taken to the Contradictory and Inconsistent Conclusions Contained in the Proposed Report

In this report the examiner finds that the Commission's earlier opinion and order in this matter should be set aside. He proposes repudiation and reversal of the opinion and order which were approved by the United States Supreme Court.

In support of his proposed finding, the examiner determines that (page 4):

> The conclusion in the original report that the proposed 10-cent fare would be unreasonable was based chiefly on the finding that "the revenue results to respondent, especially over an extended period of time, would be more favorable under an 8-cent than under a 10-cent fare on the downtown line." Under conditions as they were then and until the early part of 1942 that fact finding appears to have been correct, but those conditions have since materially changed, as will presently be discussed.

At page 6 it is said:

> These conditions have now materially changed. The incidences of war conditions within the last year have arrested the decline of respondent's traffic and actually augmented it.

Thus we find that the examiner is of the opinion that such changed conditions justify a complete reversal of the earlier opinion. He finds in effect that under such changed conditions:

> the revenue results to respondent, *especially over an extended period of time*, would be more favorable under a 10-cent fare than under an 8-cent fare on the downtown line.

However, the examiner reacts in horror to protestant's suggestion that such changed conditions might occasion substantial increases in passenger traffic, and that greater revenues would therefore derive from the present 8-cent fare than under the proposed 10-cent fare.

[fol. 611] He states that (page 11):

> If credence could be assigned to protestant's prophecy of increase for 1943 under the present fares, joint and local, the excess gross revenue for 1943 over 1941, allowing for the estimated increased costs for 1943, would result in $442,251.68 more than necessary to meet the estimated increased cost and the deficit which for the year 1941 amounted to $892,148.32.

But concludes that:

> Such estimates of increased traffic are merely conjecture based upon an abnormal condition that is far from permanent, and should not be persuasive in this proceeding.

In other words, we are to believe that "abnormal" and "changed conditions" are sufficiently permanent to justify a finding directly contrary to that previously made by the Commission. But they are not sufficiently permanent to justify a conclusion that the increase in traffic occasioned by such conditions will continue. "Sauce for the goose (respondent) is [not] sauce for the ganders" (protestants).

At page 20 it is said:

> Rates should not be made permanent based upon abnormal conditions of a transitory nature, but the circumstances and conditions as developed upon further hearing tend to the conclusion that respondent is entitled to earn somewhat greater revenue than at present.

This conclusion can only be supported, if at all, by the improper consideration of the evidence which we have pointed out. If the contentions of respondent and protestants are to be considered in the same light, i.e., upon the theory that changed conditions will continue for such time as to be considered fairly permanent, then full and fair evaluation must be made of protestants' estimates. They can not fairly be disregarded as "merely conjecture [fol. 612] based upon an abnormal condition that is far from permanent". On the other hand, if of a mind that "changed conditions" are "abnormal" and of a "transitory nature" and, therefore, too unstable for consideration, the examiner should find that respondent's case has failed and that the earlier finding of the Commission must hold.

These contradictions and inconsistencies react favorably to the benefit of the respondent. They implant the doubt as to whether the proposed report proceeds forwardly to a proper finding upon the facts, or backwardly from a predetermined finding not justified by the conclusions stated in the report.

These contradictions and inconsistencies should and must be fairly resolved.

[fol. 613] Exception Is Taken to the Proposed Report which Infers that Emergency Transportation Conditions Resulting from the War Are Justification for Forcing Increased Fares upon the Passenger Public

The proposed report sets forth the "incidences of war conditions within the last year" which have arrested the decline of respondent's traffic. These apparently are of the principal justifications for the ultimate proposed finding that the ten cent fare is justified.

We except from the suggestion that higher fares are now justified because the use of other forms of transportation has been curtailed and because war plants require the

transportation of more workers. The new conditions referred to are those resulting from our extreme war effort and dislocated transportation systems, and they are not justification for reversal of the earlier opinion.

The inference that an increase is now justified because of the "incidence of war conditions", which was not justified under peaceful conditions, means simply that an increase may be effected now because the passengers must bear it perforce. It is intended that this matter be decided and fares fixed according to what it is believed the traffic will bear, and in disregard of other possible sources of revenue such as interline divisions, the proposed report should specifically so state.

[fol. 614] Exception is taken to the failure to explain the reasoning which justifies a reversal of the earlier opinion and order

We have noted elsewhere herein the failure of the proposed report to set forth findings and conclusions which would justify the reversal of the findings and conclusions contained in the earlier report herein. Another illustration of this lack of foundation is the failure of the report to find that the charging of the same fares on the downtown line as on the uptown line would not be unduly prejudicial.

At page 754 of the earlier report it is said:

> From what has already been said herein it is evident that any increase in the uptown fare of 10 cents could hardly be expected to return increased net revenue to respondent. * * * In this connection, however, it is noteworthy that the cost per passenger to respondent in the uptown service is evidently substantially greater than that in the downtown service. This is apparent, not only from the difference in the hauls, but from the number of passengers per car transported on the respective lines. * * * From the standpoint of the cost of the service to respondent, therefore, as well as the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents.

From this language it is clear that the Commission there found that identical rates on both the uptown and downtown lines would be discriminatory in that they would unduly

prejudice the downtown passengers and give undue preference to the uptown passengers. Such discrimination is, of course, violative of the provisions of the Interstate Commerce Act. Yet the examiner in this proposed report, in the customary manner manifested throughout the writing, quickly and without reason disposes of this important issue as follows (page 16-17):

> [fol. 615] Protestants contend that to charge the same fare, 10 cents, on the downtown line as on the uptown line would be unduly prejudicial to downtown passengers and unduly preferential of uptown passengers.

After recognizing the issue, the examiner refers only to protestants' statements showing the average mileage between stations on the uptown and downtown lines. Then, without discussion, the examiner finds simply that:

> The record on further hearing does not support a finding of undue prejudice, based on distance or other considerations.

Thus in this simple, naive manner is the issue laid at rest. Without any explanation whatsoever, the earlier finding of the Commission, as approved by the Supreme Court, is reversed and nullified.

The record on further hearing does not contain evidence contradictory to that which served as the basis for the previous finding that identical fares would be unduly discriminatory.

We except from the proposed summary disposition of this issue, and suggest that the report be revised to show specifically wherein the present record justifies a conclusion contrary to that expressed in the earlier opinion on this subject.

[fol. 616] Exception is taken to the misstatements and misconstructions of the brief of the Price Administrator

At page 15 of the proposed report it is stated:

> Various other analyses of the earnings and revenues of respondent are dealt with at great length by the Price Administrator in his brief, but they are directed to the earning capacity of respondent much of which has already been discussed in this report, rather than as to whether the proposal would result in inflation or

> substantial increased cost of living under the Emergency Price Control Act under authority of which the Price Administrator filed his brief on behalf of the Director of Economic Stabilization, which subject will presently be discussed.

This language of the report suggests that the interest of the Price Administrator in this proceeding, or others of like nature, does not embrace the right to question and consider the financial position, earnings and revenues of respondent. The rights of the Price Administrator in such matters is fully discussed in the opinion of the District Court of the United States for the District of Columbia in the cases of Byrnes, et al., v. Flanagan, et al., decided February 1, 1943. It is inconceivable that this veiled suggestion should be made that the Price Administrator exercise the right of intervention conferred by the Act of October 2, 1942, without regard to a consideration of the financial position, earnings, and revenues of respondent. Mayhap the examiner was unduly swayed by the glowing nature of respondent's reply brief.

Again at page 17 it is said:

> While the brief filed by the Price Administrator contains the allegation that the cost of living would be increased by the proposed 2-cent increase in the downtown fare, and that this would ultimately result in [fol. 617] disastrous inflation, substantially the whole of the brief constitutes a reply to the original briefs which were filed on October 24, 1942, by the parties, including respondent, concerning whether the proposed increase would constitute a violation of the Interstate Commerce Act.

Such statements are wholly at variance with the facts. As to the first part of this statement we invite comparison to that which was actually set forth in our brief at pages 23-24:

> In a vital defense area such as the New York-New Jersey area served by petitioner, where millions of defense workers are employed, adequate commutation facilities must be provided. And they must be made available at reasonable fares. Otherwise the cost of living of such workers will increase and may occasion demands for increases in wages and salaries. Thus is the spiral commenced which leads ultimately to disastrous inflation. That the proposed increased fare

would result in a considerable increase in the cost of living of the commuting passengers has always been found by the Commission (227 I. C. C. 757-758).

We apparently were in error in our assumption that the elementary factors which contribute to the inflationary spiral would be readily understood by those interested in the reading of our brief. What we had reference to was that spiral which starts with increases in cost of necessary living items. The pressure placed on the individual by the snowballing of such increases occasions him to demand higher wages. The employer needs increased revenues to off-set increased operating costs resulting from such increased labor costs. Thus the circle is complete. Then the same things continue the spiral until we are ultimately faced with the threatened destruction of our economy by inflation. To this we had reference. We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine. But rather we suggested that such increase when coupled [fol. 618] with other increases in the cost of living commence the rise of that spiral, which, if not arrested, must lead inevitably to the pitfall of inflation. It was not said that the increase of fares in itself "would ultimately result in disastrous inflation". We ask that the report be corrected to conform to the facts.

The references in the report to the brief of the Price Administrator are taken up primarily with the criticism by respondent of the brief, which criticism the report seems to espouse. The report ignores, however, the most pertinent portion of the argument on behalf of the Price Administrator.

The main portion of that brief is but a prelude to the ultimate conclusion that no showing has been made by respondent to conclusively demonstrate that a 2-cent increase above the fare in effect on September 15, 1942, is "necessary to aid in the effective prosecution of the war or to correct gross inequities".

We pointed out the language and purposes of the Emergency Price Control Act of 1942. And we also pointed out the avowed purpose of Congress as contained in the amendatory Act of October 2, 1942. We reminded the Commission of the President's directive to it and to "all departments and agencies of the Government * * * to stabilize the cost of living in accordance with the Act of

October 2, 1942", as set forth in Paragraph 4 of Title I of Executive Order No. 9250.

Despite these things, the proposed report omits any reference to the findings required by the Act of October 2, 1942. We request that the report be amended to show wherein it is found that the increased fare is "necessary to aid in the effective prosecution of the war or to correct gross inequities", without which showing the Act says adjustments should not be made.

[fol. 619] Exception is taken to the general failure of the proposed report to evaluate the evidence

This proposed report fails generally to evaluate the evidence presented on further hearing. In the main, it consists merely of a narrative summation of certain portions of the several briefs. No serious attempt is made to resolve the issues presented.

On several points the examiner reaches certain conclusions or findings. But almost without exception, the reasoning which leads to such conclusions or findings is wholly lacking. There are no subsidiary findings, no explanations, nor discussions of the evidence.

The report does not show wherein there is jusitfication for upsetting the opinions of the Commission and the Supreme Court in this matter. It merely finds that this should be done.

[fol. 620] Conclusion

We conclude that the proposed report fails to set forth reasons, conclusions, or findings sufficient to justify the reversal or setting aside of the earlier opinion in this matter.

Therefore, it is respectfully requested that the report proposed be modified and corrected in the manner heretofore indicated, and in such other respects as may be proper, and that the petition for increased fare be dismissed or denied.

Respectfully submitted, Prentiss M. Brown, Administrator of the Office of Price Administration. On behalf of James F. Byrnes, Director of Economic Stabilization. By David Ginsburg, General Counsel. Harold Leventhal, Assistant General Counsel, Harry R. Booth, Utilities Counsel. W. Russell Gorman, Attorney. Legal Division, Office of Price Administration.

[fols. 621-622] CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each of their attorneys of record.

Dated at Washington, D. C., this 8th day of March, 1943.

W. Russell Gorman, Attorney.

[fol. 623] HUDSON & MANHATTAN EXHIBIT "I"

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. DOCKET No. 4394

PASSENGER FARES OF THE HUDSON & MANHATTAN RAILROAD COMPANY

Reply of Hudson & Manhattan Railroad Company to motion of Fred M. Vinson, Economic Stabilization Director, by Prentiss M. Brown, Price Administrator, for modification and amendment of the Commission's order of September 18, 1943, and for reopening

The Economic Stabilization Director, through the Price Administrator,* has petitioned the Commission

> "to modify and amend its order of September 18, 1943, to eliminate the restrictions heretofore imposed upon said reopened hearing, [*and*] to reopen said proceedings for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits [fol. 624] relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942 * * *."

It is significant that the New Jersey protestants have neither joined in that petition nor filed such a petition on their own behalf. The reason is obvious.

---

* Hereinafter in this reply the term "Price Administrator" will be used to designate both that official and the Economic Stabilization director.

The petition of the Price Administrator asks the reopening of the Commission's findings and order of June 8, 1943 which authorized the railroad to increase to 9 cents the 8 cent fare in effect on its downtown line, and which lower fare had been in effect on that line on September 15, 1942 by virtue of the Commission's findings and order of July 11, 1938. The New Jersey protestants could not join in such a petition without stultifying their complaint, filed on September 16, 1943, and still pending in the United States District Court for the District of New Jersey. That complaint (Exhibit F-143) specifically asked that the Court require the Commission to abide by its report and order of June 8, 1943, prescribing a 9 cent fare as a maximum reasonable fare on the railroad's downtown line, and to enjoin the Commission from the modifications of said 9 cent fare authorized by that report and order. As a way out of this dilemma resort was had to the transparent device of having the Price Administrator, instead of the New Jersey protestants, file a petition for reopening, attacking the reasonableness of such 9 cent fare.

The anomolous situation is, therefore, presented where the Price Administrator seeks reopening on an issue with which the Price Administrator, in his representative capacity, has, primarily at least, no proper concern,* that [fol. 625] is, the reasonableness, under the Interstate Commerce Act, of the 9 cent fare on the railroad's downtown line, authorized by the Commission's order of June 8, 1943, whereas the New Jersey protestants, who presumably would be primarily interested in this issue, have filed no petition for reopening with respect to it.

---

* In this connection, see the railroad's brief of December 28, 1942, in reply to the Brief for Leon Henderson, Price Administrator, etc., dated December 14, 1942. Under Points I, II and III of the railroad's brief, it is shown that the only issue in these proceedings with which the Price Administrator is properly concerned, under his intervention as representative of the Director of Economic Stabilization, is whether an increase in the railroad's fares will result in inflation or increased cost of living, and that the Price Administrator primarily has no concern, under such intervention, in any issue as to the reasonableness of those fares under the Interstate Commerce Act.

On the other hand, the Price Administrator's petition for reopening, so far as it touches at all the issue with which he primarily has any proper concern, that is, the issue of inflation, fails wholly to comply with Rule 101 (b) of the General Rules of Practice.

That rule reads as follows:

> "Rule 101. Petitions for rehearing, reargument or reconsideration.
>
> • • • • • • •
>
> (b) *Rehearing or further hearing.* When in a petition filed under this rule opportunity is sought to introduce evidence, *the evidence to be adduced must be stated briefly,* such evidence must not appear to be cumulative, *and explanation must be given why such evidence was not previously adduced.*"

[fol. 626] The only reference in the Price Administrator's petition for reopening, even by implication, to the issue of inflation is to be found in Paragraph 11 of that petition, where the Price Administrator states:

> "Protestant believes that the increase in rates over and above 8 cents on the downtown lines of respondent is not necessary, that the company's earnings under the existing fares is adequate and that increase in fares over and above the fares in effect on September 15, 1942, is contrary to and in conflict with the national stabilization program and policies of the government and will interfere with the efforts and duties of protestants to keep down the cost of living under such legislation. • • •"

Plainly, this statement is purely argumentative and does not state, briefly or otherwise, what evidence the Price Administrator proposes to adduce on further hearing, showing, or tending to show, that either the 9 cent fare on the railroad's downtown line authorized by the Commission's findings and order of June 8, 1943, or the modifications of that fare authorized by the Commission's findings and order of August 3, 1943, would or could result in inflation or increased cost of living.

Neither does Paragraph 11 of the Price Administrator's petition state, as required by Rule 101 (b)

> "why such evidence was not previously adduced."

The reason for the failure of the Price Administrator's petition to comply with Rule 101 (b) in this respect is obvious. It is the very reason the Price Administrator has previously given for not adducing such evidence, that is, [fol. 627] that no such evidence exists. At page 20 of the Price Administrator's exceptions of March 3, 1943 to the proposed report of Examiner Trezise, the Price Administrator expressly conceded that

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

It is to be noted, moreover, that the Price Administrator made this concession in connection with the then pending proposal of the railroad to increase the fare on its downtown line to 10 cents, which 10 cent fare Examiner Trezise's proposed report had recommended should be approved. Clearly, if, as the Price Administrator then expressly conceded, a 10-cent fare on the railroad's downtown line could not, in itself, result in inflation, still less could the 9 cent fare authorized by the Commission's order of June 8, 1943 have such a result.

Furthermore, it is to be noted that in the Commission's report of June 8, 1943 the Commission itself specifically disposes of any contention that the increase in the fare on the downtown line to 9 cents there authorized could result in inflation or otherwise conflict with the Emergency Price Control Act of 1942, as amended.

At Sheet 17 of that report, the Commission says:

> "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and [fol. 628] 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended."

It is equally clear that the Price Administrator's petition for reopening does not comply with Rule 101 (b), even so far as the only real issue presented by that petition is

concerned, that is, the reasonableness of the 9 cent fare on the railroad's downtown line authorized by the Commission's order of June 8, 1943. Here again, the Price Administrator's petition fails to state, briefly or otherwise, what evidence he proposes to adduce on this issue, unless the nature of such evidence can be deduced *arguendo* from Paragraphs 7 and 8 of that petition.

Paragraphs 7 and 8 refer to the Examiner's refusal, at further hearing on September 28 and 29, 1943, to permit the introduction of certain evidence, purporting to be directed to the reasonableness of the 9 cent fare, on the ground that such evidence went beyond the limitations of the Commission's order of reopening of September 18, 1943. The Examiner construed that order as limiting the evidence to be received under it to evidence directed solely to the modifications of the Commission's findings and order of June 8, 1943, made by the Commission's findings and order of August 8, 1943, and, therefore, as not extending to the receipt of evidence directed to the reasonableness of the 9 cent fare authorized by such findings and order of June 8, 1943. It is presumably this excluded evidence which the Price Administrator, by the prayer of his petition, asks leave to present on reopening.

It is to be noted, however, that the Price Administrator clearly misconceives the relevance of such excluded evidence, [fol. 629] both legally and factually, to the question of the reasonableness of the 9 cent fare on the railroad's downtown line authorized by the Commission's findings and order of June 8, 1943.

Assuming that such evidence would show that the railroad, under the 9 cent fare, had it become effective, would have earned more revenue than the Commission had estimated it would earn under such fare, this would neither prove nor tend to prove the 9 cent fare unreasonable or otherwise unlawful. This is clearly demonstrated by the fact that in the Commission's findings and order of August 3, 1943 it permitted such 9 cent fare to be slightly increased, in spite of the fact, as recited at Sheets 8 and 9 of the Commission's report of that date, that the number of interstate local passengers carried on the railroad's downtown line in the first half of 1943, adjusted to an annual basis, reflects an increase over 1941 of 18.2 per cent., compared with an increase of 12.7 per cent. as estimated by the Commission at Sheet 16 of its report of June 8, 1943.

The fallacy of the Price Administrator's contentions with

respect to the excluded evidence lies in the assumption that the 9 cent fare on the railroad's downtown line authorized by the Commission's findings and order of June 8, 1943 would, *ipso facto*, become unreasonable if, under that fare, the railroad should earn greater revenue than the Commission had estimated that fare would yield. The purpose of the Commission's estimate was not to limit the railroad to earning only such revenue under the authorized 9 cent fare as in the Commission's then judgment that fare might yield. Such estimate was merely to indicate that, as a maximum reasonable fare, the authorized 9 cent fare should [fol. 630] be adequate, or substantially adequate, to yield the revenue necessary to meet the railroad's current bond interest. Neither in a revenue case, or in any other proceeding, would the Commission have had authority to authorize higher than a maximum reasonable fare, even though such a fare could not yield the railroad the revenue adequate to meet its current bond interest. On the other hand, if, as the Commission's report of June 8, 1943 expressly finds, the 9 cent fare would in itself not exceed a maximum reasonable fare, it could not become *per se* unreasonable merely because it might yield the railroad more revenue than the Commission then estimated.

There is a further paradoxical aspect to the Price Administrator's petition for reopening. That petition obviously is not complete in itself and the contention of the Price Administrator that the 9 cent fare authorized by the Commission's findings and order of June 8, 1943, is unreasonable can only be fully understood by a reference to Point I (b), (c) and (d) and Point III (b) of the Price Administrator's brief, dated October 14, 1943, upon the reopened hearing of September 28, 1943, and to Appendices A and B to that brief.

Obviously the railroad would have been justified in moving to strike such portions of the Price Administrator's brief as clearly violating the limitation upon the issues made in the Commission's order of reopening of September 18, 1943 and the Examiner's express rulings under that order.*

* That is likewise true of similar contentions in the brief, dated October 14, 1943, of the New Jersey protestants on such reopening, entitled "Brief of Protestants on Further Hearing commencing September 28, 1943."

[fol. 631] The railroad, however, made no motion to strike such portions of the Price Administrator's brief, because they serve further to make clear the fallacies involved in the Price Administrator's contentions with respect to the unreasonableness of the 9 cent fare on the railroad's downtown line authorized by the Commission's findings and order of June 8, 1943, as well as in the Price Administrator's similar contentions as to the modifications of such findings and order made by the Commission's findings and order of August 3, 1943.

The contentions of the Price Administrator's brief in these respects are epitomized at pages 8-10 of his brief, taken in connection with Appendices A and B thereto. They are in substance that the railroad's evidence is erroneous in representing that under its proposed uniform application to its downtown and uptown lines of the alternative fares of 11 tokens for $1 or a cash fare of a dime, the railroad would earn less revenue than it would earn under the application of a straight 9 cent fare on its downtown line and a straight 10 cent fare on its uptown line. The Price Administrator's brief attempts to show that, on any assumed basis of token use shown by the record, the railroad would earn more under its proposed uniform alternative fares than under the application of a 9 cent fare to its downtown line and a 10 cent fare to its uptown line; further that the railroad, even on the basis of its assumed use of 90 per cent. tokens and 10 per cent. dime cash fares, would earn more gross revenue than the Commission's report of August 3, 1943 estimated it would earn under the Commission's findings and order of June 8, 1943.

[fol. 632] In demonstrating the fallacies of these contentions in the Price Administrator's brief the railroad will confine itself to such contentions applied to a token use of 90 per cent, and a cash fare use of 10 per cent. This is because, as shown under Point III of the railroad's brief dated October 14, 1943 on reopening and further hearing, there is no competent testimony in the record to justify the Price Administrator's use in his brief of estimates of probable average token use either of 33.76 per cent. or 47.5 per cent. Neither is there any competent evidence to show that the Commission erred in accepting a 90 per cent. token use as a reasonable estimate, as stated at Sheet 7 of its report of August 3, 1943.

It may be categorically stated that all contentions of the Price Administrator relating to a 90 per cent. token use and a 10 per cent. cash fare use are based on errors of fact.

These contentions are all directed to the railroad's Exhibit F-150, presented by its Comptroller, Mr. Fritsch, and to his testimony with relation to such exhibit. Mr. Fritsch testified (Tr. 2210) that on the basis of the actual local interstate traffic on the railroad's downtown and uptown lines for the eight months ended August 31, 1943, adjusted to twelve months, and under the railroad's proposed alternative fares uniformly applied to its uptown and downtown lines on an assumed use of 90 per cent. tokens and 10 per cent. cash fares, the railroad would earn $81,451.89 less than it would earn on the same traffic under a straight 9 cent fare on its downtown line and a 10 cent fare on its uptown line. Mr. Fritsch further testified that this figure did not take into consideration the Commission's estimate in its [fol. 633] report of August 3, 1943 that under either a 9 cent cash fare or a 9 1/11 cent token fare there would be a 5 per cent. diversion of the railroad's traffic on its downtown line. Based upon a hasty calculation made at the hearing, Mr. Fritsch testified (Tr. 2211) that giving effect to such a 5 per cent. diversion the reduction in revenue would be $74,538.80 instead of $81,451.89. This figure of $74,538.80 is patently erroneous. It is obvious that with a diversion of 5 per cent. of the traffic on the downtown line the reduction in revenue would have to be greater than with no such diversion.

The following tabulation shows what the revenues would be under the proposed alternative fares on the basis of the annual traffic shown by Exhibit F-150, giving effect to a 5 per cent. diversion on the downtown line, and with an assumed 90 per cent. use of tokens and a 10 per cent. use of cash fares:

Downtown, less 5% diversion.....	36,630,963		
90% @ tokens, 11 for $1.....	32,967,858	$2,997,078.09	
10% @ 10¢.....	3,663,095	$366,309.50	$3,363,387.59
Uptown, no diversion or increase..	18,523,875		
90% @ tokens, 11 for $1.....	16,671,488	$1,515,589.82	
10% @ 10¢.....	1,852,387	$185,238.70	$1,700,828.52
Total			$5,064,216.11

If a 9 cent fare were applied to the number of downtown passengers shown by Exhibit F-150 with a 5 per cent. diver-

sion, the revenue would be $3,296,786.77, and if a 10 cent [fol. 634] fare were applied to the uptown passengers shown by Exhibit F-150 with no diversion, the revenue on that line would be $1,852,387.50, or a combined total revenue of $5,149,173.27. The foregoing tabulation therefore shows that the resulting reduction in revenue would be $85,957.16 instead of $74,538.80 as stated by Mr. Fritsch.

The foregoing tabulation, moreover, shows that under the railroad's proposed alternative fares, taking into account a 5 per cent. diversion on the downtown line, the revenue would be $177,020 less than the $5,241,236 revenue shown on Exhibit F-150, which exhibit does not give effect to such estimated diversion of downtown traffic.

That tabulation, however, is of conclusive significance in connection with Appendix B to the Price Administrator's brief. In Appendix B the Price Administrator expressly concedes that the reasonable gross revenue which the railroad might earn under the Price Administrator's construction of the Commission's order of June 8, 1943, would be $5,165,641. The tabulation demonstrates that the total gross revenue which the railroad would earn under its proposed alternative fares, giving effect to an assumed 5 per cent. diversion on the downtown line, is $5,064,216, or $101,425 less than the Price Administrator concedes the railroad would be entitled to earn under the Commission's order of June 8, 1943, as that order is construed by the Price Administrator.

It would seem that any further reply to the Price Administrator's petition for reopening would be superfluous.

The railroad therefore respectfully submits that the Price Administrator's motion for modification and amendment [fol. 635] of the Commission's order of September 18, 1943, and for reopening, be denied.

Respectfully submitted, John E. Buck, Thomas A. Halleran, John F. Finerty, Attorneys for Petitioner, 30 Church Street, New York, N. Y.

Cravath, de Gersdorff, Swaine & Wood, 15 Broad Street, New York, N. Y., of Counsel.

October 25, 1943.

[fol. 636] Certificate of Service

I hereby certify that I have this day served the foregoing brief upon all parties of record in these proceedings, by mailing a copy thereof, properly addressed to each party of record.

Dated at New York, N. Y., this 23rd day of October, 1943.

John F. Finerty.

[fols. 637-638] Hudson and Manhattan Exhibit "2"

S. S. Eisen, 140 Cedar Street, New York 6, N. Y.

October 25, 1943.

Our file: FN-672.

Re: I. & S Docket No. 4394 Passenger Fares—Hudson & Manhattan Railroad.

Mr. W. P. Bartel, Secretary, Interstate Commerce Commission, Washington 25, D. C.

Dear Sir:

Under date of October 14, 1943, the Economic Stabilization Director, by the Price Administrator, the Office of Price Administration, filed a motion for modification and amendment of the Commission's order of September 18, 1943, and for reopening of the proceeding captioned as above.

On behalf of the New Jersey protestants we hereby adopt and otherwise ratify the contents of the aforesaid petition as though it were our own. In addition to the matters set forth in the aforesaid motion it is the position of the New Jersey protestants herein that they were precluded from offering and establishing evidence and data that was and is directly pertient to the issues herein involved. Protestants sought to establish that the revenues produced by the eight cent downtown fare currently in effect was and is adequate to meet the current revenue needs of the respondent and that accordingly ipso facto any fare in excess of an eight cent fare would produce revenue over and above that needed. This evidence and testimony was precluded by the examiner under the alleged circumscription of the issues involved.

At such further hearing the protestants will introduce testimony and evidence which will show that the present revenues are sufficient and adequate to meet the respondent's bonded indebtedness requirements and other operating expenses and that any fare in excess of eight cents is unreasonable and improper in the premises.

Yours very truly, (Original signed) Charles Hershenstein, S. S. Eisen, For all New Jersey Protestants.

SSE. F. CC: All parties of record.

[fol. 639] HUDSON AND MANHATTAN EXHIBIT "3"

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 4394

Investigation and Suspension Docket

Passenger Fares of Hudson & Manhattan Railroad Company

PETITION OF HUDSON & MANHATTAN RAILROAD COMPANY FOR REOPENING OF THE PROCEEDINGS HEREIN, FOR FURTHER HEARING HEREIN, AND FOR LEAVE TO PUBLISH AND CHARGE A 10 CENT FARE BETWEEN HUDSON TERMINAL, NEW YORK CITY, AND STATIONS IN JERSEY CITY AND HOBOKEN, NEW JERSEY

Petitioner, Hudson & Manhattan Railroad Company, respectfully petitions the Commission for reopening of the proceedings herein, for further hearing herein, and for an order permitting petitioner to publish and charge a 10 cent fare between the station of petitioner at Hudson Terminal, New York City, and its stations in Jersey City and Hoboken, New Jersey. In support of this petition, petitioner respectfully shows to the Commission as follows:

I

On July 11, 1938, the Commission issued its report and order herein requiring petitioner to cancel the local passen-
[fol. 640] ger tariff which it had issued, published and

filed with the Commission establishing a 10 cent fare between Hudson Terminal and the stations of petitioner in Jersey City and Hoboken, and authorizing petitioner to establish an 8 cent fare between Hudson Terminal and such stations, which the Commission found in such report would be a maximum reasonable fare between Hudson Terminal and such stations (227 I. C. C. 741).

By a decree entered on October 9, 1940, a three-judge United States District Court in the District of New Jersey dismissed a complaint by petitioner seeking, in substance, to enjoin said order of the Commission, *Hudson & Manhattan Railroad Company* v. *United States*, 33 F. Supp. 495. On April 28, 1941, the Supreme Court of the United States affirmed such decree, *Hudson & Manhattan Railroad Company* v. *United States, et al.*, 313 U. S. 98.

II

On January 21, 1942, the Commission issued its order in *Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942*, authorizing the petitioning carriers therein to increase their then existing passenger fares by 10 per cent. Through mistake and without the knowledge, authority or approval of petitioner, its name was included in the list of petitioners in *Ex Parte No. 148*. The order of the Commission therein literally, therefore, permitted petitioner to increase its then existing passenger fares by 10 per cent. The then, and presently, existing passenger fares of petitioner were 8 cents between Hudson Terminal and its stations in Jersey City and Hoboken and 10 cents [fol. 641] between its stations on its uptown line in Manhattan and its stations in Jersey City and Hoboken. Petitioner might, therefore, pursuant to such order have published and charged a fare of 9 cents between Hudson Terminal and its New Jersey stations, and a fare of 11 cents between its uptown Manhattan and its New Jersey stations.

On February 18, 1942, petitioner, by letter addressed by the Chairman of its Board of Directors to Mr. Commissioner Porter, advised the Commission that petitioner had no intention of taking advantage of the technical opportunity to publish such fares of 9 cents and 11 cents, respectively, but that it would apply to the Commission for specific authority to increase to 10 cents its fare between Hudson Terminal and its stations in Jersey City

and Hoboken, since petitioner was convinced that such an increase was essential.

III

Aside from its unwillingness to take advantage of the purely technical opportunity to publish a 9 cent fare on its downtown line and an 11 cent fare on its uptown line, petitioner did not undertake to publish such fares for the following reasons:

(a) The petition in *Ex Parte No. 148* for leave to make a 10 per cent. increase in passenger fares purported to be based primarily upon the need of the carriers, parties thereto, for additional revenues to meet the cost of the increased wages of the employees of such carriers which resulted from the mediation settlement arranged by the President's Emergency Board acting as a Board of Media-
[fol. 642] tion as set forth in its supplementary report of December 5, 1941. The employees of petitioner were not parties to, or affected by, that settlement.

(b) The petition in *Ex Parte No. 148* specifically requested a maximum increase of 10 per cent. in passenger fares, and the order of the Commission therein had the effect of a finding that passenger fares so increased would constitute maximum reasonable fares for the petitioning carriers.

(c) Petitioner was, and is, of the opinion that, if its 8 cent fare on its downtown line and its 10 cent fare on its uptown line should be increased by 10 per cent., such fares so increased would neither constitute maximum reasonable fares for petitioner nor would they afford petitioner the additional revenues necessary to meet its increased operating expenses and taxes and to pay current interest on its bonded indebtedness.

(d) Petitioner was, and is, further of the opinion not only that an increase of fare on its downtown line to 9 cents and on its uptown line to 11 cents would not produce such additional revenues required by petitioner, but that an increase of the fare on its donwtown line to 10 cents would be the only practicable means of affording petitioner any reasonable possibility of obtaining such additional revenues.

(e) Petitioner was, and is, also of the opinion that the difficulties of collecting fares of 9 cents and 11 cents, with the existing fare collecting facilities of petitioner, render [fol. 643] such fares impractical in that it is probable that petitioner would, in many instances, be unable actually to collect such fares in full.

(f) Petitioner was, and is, also of the opinion that the respective services rendered on its downtown line and on its uptown line do not justify any difference in fare on such lines.

(g) Finally, petitioner was, and is, of the opinion that a 10 cent fare on its downtown line should enable petitioner to obtain from The Pennsylvania Railroad Company a division of the joint fare between Newark and Hudson Terminal on the joint rapid transit service of petitioner and that Company not less than the division which petitioner obtains of the joint fare on such service between Newark and points on the uptown line of petitioner, instead of its present division of 7.64 cents of the joint fare on such service between Newark and Hudson Terminal.

IV

This Commission in its report herein found that petitioner then needed approximately $1,000,000 additional gross revenues annually in order merely to pay increased railway operating expenses, increased taxes and current interest on its bonded indebtedness, excluding any payment of cumulative interest in arrears on its Adjustment Income Bonds and of dividends. The Commission also found in such report that compared with other fares which were generally used by commutation passengers between the New York commuting area and downtown Manhattan, especially [fol. 644] from and to New Jersey points, the fare of 10 cents on its downtown line then proposed by petitioner would be unreasonable and that a fare of 8 cents on such line would be a maximum reasonable fare; that the revenue results to petitioner, especially over an extended period of time, would be more favorable under an 8 cent fare than under a 10 cent fare on its downtown line; that the establishment of an 8 cent fare would result in a diversion of 15 per cent of the traffic moving on that line; and that, under such a fare on its downtown line, petitioner would earn net

income for the year 1938 of about $2,260,817. This amount was approximately $541,000 less than the amount which the Commission found to be necessary to enable petitioner merely to pay increased operating expenses, increased taxes and current interest on its bonded indebtedness.

The Commission also stated in such report that, if petitioner "should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic", that is, on its joint rapid transit service with The Pennsylvania Railroad Company.

V

Petitioner will, if accorded reopening and further hearing of these proceedings, present additional evidence which will show that conditions have changed substantially since February, 1938, when the hearing herein was had upon which the order of the Commission herein is based; that a fare of 8 cents on the downtown line of petitioner is not now a maximum reasonable fare; that a 10 cent fare on such [fol. 645] downtown line is not, and will not be for the future, in excess of a maximum reasonable fare; that a 10 cent fare on such downtown line would yield higher revenues to petitioner than its present 8 cent fare on such line; and that a 10 cent fare on such downtown line is necessary to enable petitioner to continue to provide, in the public interest, adequate and efficient railway transportation service and to afford petitioner any reasonable possibility of obtaining the additional gross revenues necessary to enable it to pay its further increased operating expenses and taxes and its current interest on its bonded indebtedness. Such evidence will be in substance as hereinafter stated.

VI

A 10 cent fare on the downtown line of petitioner is not, and will not be, in excess of a maximum reasonable fare, tested by generally accepted standards for determining maximum reasonable fares, including comparison with fares generally used by commutation passengers between the New York commuting area and downtown Manhattan, especially from and to New Jersey points, as such fares have been increased by the recent order of the Commission in *Ex Parte No. 148*.

VII

The net income from railroad operations of petitioner for the year 1941 was $892,148.32 short of the amount needed by petitioner to enable it to meet merely its current interest requirements on its bonded indebtedness allocated [fol. 646] to its railroad operations on the basis approved by the Commission in its reports herein,* exclusive of any amount for payment of accrued interest in arrears on its Adjustment Income Bonds or for payment of any dividends upon its outstanding stock.

Beginning with the year in which the 8 cent fare was established on the downtown line of petitioner, the amount by which the net income from railroad operations of petitioner available for current bond interest in each year, respectively, was insufficient to meet such interest in such year was as follows:

1938	$1,113,749.83**
1939	$ 806,048.05
1940	$ 817,424.09
1941	$ 892,148.32

The accrued and unpaid interest due on the Adjustment Income Bonds of petitioner as of December 31, 1941, was $5,494,727.09, compared with an amount of such accrued and unpaid interest due as of December 31, 1937, of $2,118,746.80.

VIII

The total railway operating expenses of petitioner for 1941 as compared with 1937 increased 6.73 per cent, despite a decrease of 5.27 per cent in total car miles operated in 1941 under 1937. Included in such increased operating ex- [fol. 647] penses in 1941 over 1937 was an increase of 12 per cent in labor costs.

Moreover, while the total number of passengers carried by petitioner in 1941 was 15.57 per cent less than in 1937, ex-

---

* References hereinafter made to the interest requirements of petitioner are confined to interest on that portion of its bonded indebtedness so allocable to its railroad operations.

** The 8 cent fare on the downtown line of petitioner was established on July 25, 1938.

penses for materials and supplies and operating expenses, other than labor, were only 1.45 per cent less in 1941 than in 1937.

In addition, the taxes paid by petitioner for 1941 increased 8.45 per cent over 1937.

IX

The further loss of traffic by petitioner in the period 1938-1941, inclusive, has been due in part to a continuance of the same general factors which the Commission found in its report in these proceedings accounted for its loss of traffic in the period 1929-1937, inclusive: continuing economic depression and continuing loss in rail traffic generally, particularly by rail carriers serving the New York City-New Jersey commutation area, and increased competition of private automobiles and of motor buses using the various trans-Hudson facilities, particularly the George Washington Bridge and the Lincoln and Holland Tunnels.

Passengers in private cars using such trans-Hudson facilities increased from 63,133,000 in 1937 to 72,622,000 in 1940, while passengers in buses using such facilities increased from 19,407,000 in 1937 to 32,213,000 in 1940. In neither instance are the 1941 figures available, but preliminary estimates indicate that during 1941 there was a continuing increase in passengers in both private cars and buses using such facilities.

[fol. 648] Two additional factors not present in 1937 also contributed to such loss of traffic by petitioner in the period 1938-1941, inclusive:

1. The closing of the Thirty-third Street station of petitioner for the period between December 25, 1937, and September 24, 1939. This was necessitated by the construction by the City of New York of the Sixth Avenue subway line and resulted in a loss of traffic on the uptown line of petitioner.

2. The diversion of traffic from the downtown line of petitioner immediately following the increase of fare from 6 cents to 8 cents on July 25, 1938. This diversion amounted to approximately 16.5 per cent of the then existing traffic on such downtown line.

Such loss of traffic has taken place despite the fact that the traffic of petitioner was augmented, particularly on its

uptown line, in the years 1939 and 1940 during the periods that the World's Fair was open and despite the further fact that the joint traffic of petitioner with The Pennsylvania Railroad Company between Newark and Hudson Terminal has increased since the latter part of 1940.

X

As a result of the fare of 8 cents on its downtown line, petitioner earned in 1941 approximately $236,210 additional gross revenues over what petitioner would have earned under a 6 cent fare during the same period, assuming that under a 6 cent fare there would not have been the diversion [fol. 649] of traffic which was incident to the increase to an 8 cent fare.

XI

Petitioner would earn greater revenues under a 10 cent fare than under an 8 cent fare on its downtown line, based on the 1941 traffic of petitioner unless the diversion in traffic on such downtown line resulting from such a 2 cent increase in fare should exceed 20 per cent.

XII

An increase from 8 cents to 10 cents in the fare on the downtown line of petitioner would not result in a diversion in traffic on such downtown line in excess of 12 per cent, based on the 1941 traffic of petitioner.

XIII

An increase from 8 cents to 10 cents in the fare on the downtown line of petitioner would not result in any substantial diversion of any new traffic on such line which has been acquired, and may hereafter be acquired, as a result of the changed conditions since 1941 hereinafter specified.

XIV

Based on the 1941 traffic of petitioner, a fare of 10 cents on the downtown line of petitioner would increase the net income of petitioner from railroad operations by approximately $292,000 per annum, even assuming a diversion of 12 per cent in traffic on such downtown line. That would still leave petitioner with a deficit of approximately $600,000 per annum under current bond interest requirements, with-

[fol. 650] out taking into account either additional revenues which may result from increased traffic under the changed conditions since 1941 or any increased operating costs which may be caused by increases in rates of pay of employees, in unit prices of materials and supplies, or in taxes.

XV

The total traffic of petitioner in 1942 through June 30, 1942, excluding the last five days of April during which abnormal conditions obtained,* has shown an increase of approximately 8.45 per cent over such traffic for the corresponding period of 1941.

XVI

Such increase in traffic in 1942 over the corresponding period in 1941 has been due principally to the following factors:

1. The establishment and expansion of plants engaged in war industry and of government cantonments in territory in New Jersey served by, or tributary to, the lines of petitioner.

2. The increase in office population in downtown Manhattan, which has been due to the establishment and expansion of offices by companies engaged in war industry and by agencies of the government, and to travel between such offices and such plants and government cantonments in New Jersey.

[fol. 651] 3. Increasing travel by war industry workers and military and naval personnel stationed in New Jersey to and from Manhattan shopping and amusement centers, and of civilian visitors from Manhattan and adjacent territory to and from government cantonments in New Jersey.

4. Decreasing competition of private cars using trans-Hudson facilities, because of governmental restrictions on the purchase of gasoline, tires and cars.

---

* Beginning April 26, 1942, the traffic of petitioner was disrupted as a result of a derailment on that date at its Exchange Place Station.

XVII

Unless the fare on the downtown line of petitioner be increased from 8 cents to 10 cents, the total traffic of petitioner would have to increase approximately 20 per cent. over its total traffic for the year 1941 in order for petitioner merely to meet its current bond interest requirements, assuming that there should not be any increase in rates of pay [fol. 652] of employees,* in unit prices of materials and supplies, or in taxes. Despite the increase in the total traffic of petitioner during the current year as a result of the abnormal conditions just specified, the probability is remote that, even during the continuance of such abnormal conditions, the traffic of petitioner will increase by as much as 20 per cent. over such traffic in 1941.

XVIII

Even with a 10 cent fare on the downtown line of petitioner, its total traffic would have to increase 12 per cent. over its total traffic for the year 1941 in order for petitioner to earn its current bond interest requirements, assuming

---

* Demands have been made by groups of carrier employees of petitioner, constituting approximately 72 per cent. of all such employees, for increases in rates of pay and changes in working conditions, with respect to which petitioner was unable to agree with the representatives of the employees on behalf of whom such demands were made. The demands of approximately 70 per cent. of such carrier employees are now pending before the National Mediation Board. The increases in rates of pay and changes in working conditions so demanded by such groups constituting approximately 72 per cent. of such employees, on the basis of 1941 operations, would amount to an average increase in the total payroll costs of petitioner for such employees of 23 per cent., which would aggregate $328,300 per annum. If the remaining 28 per cent. of all such carrier employees should demand increases in rates of pay and changes in working conditions which would likewise amount to an increase of 23 per cent. of the total payroll costs of petitioner for such employees, the demands of all the carrier employees of petitioner, on the basis of 1941 operations, would represent an increase of $476,000 per annum in the total payroll costs of petitioner.

that there should not be any increase in rates of pay of employees, in unit prices of materials and supplies, or in taxes. Petitioner believes and alleges that there is a reasonable probability that its total traffic may increase within a reasonable period to an extent sufficient, with a 10 cent fare on its downtown line, to enable petitioner to meet its current bond interest requirements.

XIX

If, after the establishment of a 10 cent fare on its downtown line, petitioner should obtain from The Pennsylvania Railroad Company a division of the joint fare between Newark and Hudson Terminal on the joint rapid transit service of petitioner and that Company of 8.64 cents, which is the division which petitioner now obtains of the joint fare between Newark and points on the uptown line of peti- [fol. 653] tioner, the increased revenues to the petitioner, on the basis of 1941 traffic, would be only $113,541. Such an increase of revenues obviously would be inadequate in itself to permit petitioner to meet its current interest requirements on its bonded indebtedness. Even with the additional revenues which would result from an increase in the fare on the downtown line of petitioner to 10 cents and an increase of 12 per cent. in the total traffic of petitioner over its total traffic in 1941, the additional revenues which petitioner would receive from such an increased division of the joint fare between Newark and Hudson Terminal, including any additional revenues which reasonably may be expected from an increase in the traffic between those points, would at best afford petitioner merely the possibilty that over a long period of time it might gradually reduce the amount of accrued and unpaid interest due on its Adjustment Income Bonds.

XX

There are contained in a supplement to this petition, and hereby made a part hereof, nine exhibits marked Exhibits Nos. 5-R, 25-R, 26-R, 27-R, 28-R, 30-R, and 36-R, respectively, and Exhibits A and B, respectively. Such exhibits contain the basic statistical information upon which the foregoing allegations of this petition are made.

XXI

Petitioner has not earlier sought the relief asked in this petition for the following reasons:

The questions raised by petitioner in the litigation instituted by it as to the validity of the order made by the Com- [fol. 654] mission herein on July 11, 1938, were not finally determined until the decision of the Supreme Court of the United States on April 28, 1941. At that time the 8 cent fare which the Commission had found in its report herein would be a maximum reasonable fare on the downtown line of petitioner had been in effect for a period of approximately 21 months or several months longer than the 18 month period which the Commission in its report in *Ex Parte No. 123, Eastern Passenger Fares in Coaches* (227 I. C. C. 685), allowed as a reasonable trial period within which to determine whether the 2.5 cent passenger fares there allowed would produce better gross revenues than the previously prescribed 2 cent fares. Although, as the Commission in its report herein had specifically found would be the case, it was apparent that under the 8 cent fare in effect on its downtown line petitioner would not earn, on its then traffic, the additional gross revenues which the Commission had found in such report to be necessary in order to permit petitioner merely to meet current interest requirements on its bonded indebtedness, petitioner hoped that improved economic conditions might result in a sufficient increase in such traffic to permit it to earn such revenues. Such an increase in the traffic of petitioner did not occur. Petitioner has been unable, however, since July, 1941, to present to the Commission an accurate estimate of the amount of additional gross revenues needed by it to enable it to meet its current interest requirements on its bonded indebtedness, because in that month the New Jersey railroad tax law of 1941 was enacted, providing for the assessment against petitioner and other short line railroads [fol. 655] in New Jersey of heavily increased taxes payable to the State of New Jersey, and because almost immediately thereafter consideration was given by legislative authorities of New Jersey to proposals for amendment of such law in such a way as to reduce the amount of such heavily increased taxes. It was obvious that the future revenue needs of petitioner would of necessity be substantially affected

by the disposition made by the Legislature of New Jersey of such proposals. The due date of a portion of the taxes payable for 1941 under such law was postponed from time to time, but permanent remedial legislation was not enacted until May 8, 1942. Thereafter, a portion of the taxes payable by petitioner to the State of New Jersey for the year 1941 was retroactively assessed against petitioner on May 22, 1942. Accordingly, petitioner has not been in position until very recently to place before the Commission a reliable estimate of the additional revenues which would be needed by it in order to meet the current interest requirements on its bonded indebtednes, on the basis of its reeent operations.

Petitioner, consequently, has been forced to postpone the filing of this petition and thereby to forego the possibility of increaesd revenues which would have resulted from an increase in the fare on its downtown line.

XXII

Upon the basis of the facts set forth in the foregoing allegations of this petition, petitioner respectfully submits that:

[fol. 656] 1. It is essential that petitioner promptly obtain the increased gross revenues which will result from an increase in the fare on its downtown line to 10 cents in order that petitioner, without further delay, may have at least a reasonable possibility of meeting the current interest on its bonded indebtedness after providing the public with adequate and efficient railway transportation service, since, despite the increase which reasonably may be expected in the total traffic of petitioner, such additional gross revenues cannot be obtained except by the establishment of a fare of 10 cents on its downtown line.

2. The Commission should accord petitioner an expeditious disposition of this petition and of any hearing thereon.

3. In view of the fact that petitioner has submitted in exhibit form as a part of this petition the basic statistical information upon which the allegations of this petition are made, these proceedings, upon the reopening thereof, may properly be assigned for further hearing within thirty days from the date of the filing of this petition, without

depriving any party hereto of an adequate opportunity to meet the issues presented.

4. Upon proof at such hearing of the facts set forth in this petition, the Commission should issue an order herein permitting petitioner to publish and charge, upon short notice to the Commission and to the general public, a 10 cent fare between the station of petitioner at Hudson Terminal and its stations in Jersey City and Hoboken.

[fol. 657] Wherefore petitioner prays that the proceedings herein be reopened, that a further hearing herein be granted at the earliest practicable date and not exceeding, if possible, thirty days from the date of the filing of this petition, and that the Commission make and enter an order herein permitting petitioner to publish and charge a 10 cent fare between the station of petitioner at Hudson Terminal, New York City, and its stations in Jersey City and Hoboken, New Jersey.

Dated: June 27th, 1942.

Respectfully submitted, John E. Buck, E. Fontaine Broun, John F. Finerty, Attorneys for Petitioner, 30 Church Street, New York, N. Y.

Cravath, de Gersdorff, Swaine & Wood, 15 Broad Street, New York, N. Y., of Counsel.

[fols. 658-659] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, together with the supplement thereto, upon all parties of record in these proceedings, by mailing a copy thereof, together with such supplement, properly addressed to each party of record.

Dated at New York, N. Y., this 27th day of June, 1942.

John F. Finerty.

[fol. 660] HUDSON AND MANHATTAN EXHIBIT "4"

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 4394

PASSENGER FARES OF HUDSON & MANHATTAN RAILROAD COMPANY

Reply of City of Jersey City, New Jersey, Protestant, to Petition of Hudson & Manhattan Railroad Company for Reopening of the Proceedings Herein, for Further Hearing Herein, and for Leave to Publish and Charge a 10-Cent Fare Between Hudson Terminal, New York City, and Stations in Jersey City and Hoboken, New Jersey

Comes now protestant, City of Jersey City, New Jersey, and respectfully requests the Commission to deny the petition of the Hudson & Manhattan Railroad Company, respondent, for reopening of the proceedings herein, for further hearing herein, and for leave to publish and charge a 10-cent fare between the station of petitioner at Hudson Terminal, New York City, and its stations in Jersey City and Hoboken, New Jersey. Protestant respectfully submits that the petition is without merit in fact or law.

The action and decree of the Interstate Commerce Commission fixing 8 cents as a maximum reasonable fare (227 I. C. C. 741) was unanimously affirmed by the Supreme Court of the United States, *Hudson & Manhattan Railroad* v. *United States, et al.*, 213 U. S. 98. No grounds for reversal or reconsideration of the action and decree of the Interstate Commerce Commission have been demonstrated by the petitioner, Hudson and Manhattan Railroad Company.

[fol. 661] I

In seeking a fare of 10 cents, petitioner proposes an increase of 25 per cent in the present fare, this despite the fact that petitioner was not required to increase the wages of its employees, as a result of the mediation settlement arranged by the President's Emergency Board acting as a Board of Mediation, in December, 1941. Petitioner has very carefully and successfully maintained its status as an electric interurban carrier, similar in operation to the New York City subway system.

II

Petitioner states, III (c), (d), (e) and (f), that the services on its downtown and uptown lines justify a uniform fare of 10 cents for application on both lines. The measure of service rendered, respectively, on the uptown and downtown lines in no way has changed since the Commission, in two separate proceedings, found sufficient difference in the services to require that the fare on the downtown line should not be so great as that on the uptown line (58 I. C. C. 270 and 227 I. C. C. 741).

III

The Commission, in its report in this proceeding, specifically stated that

> "If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic (that is, on its joint rapid transit service with the Pennsylvania Railroad)."

[fol. 662] Nowhere in the petition of the petitioner is there any indication that it has followed this admonition of the Commission. Indeed, it is worthy of note that almost three years have elapsed since the Commission expressed its views, yet petitioner is here seeking "a further increase in revenue" without having resorted to the recourse suggested by the Commission. The Commission may well take judicial notice of the currently enormous increase in railroad passenger transportation. It must be obvious that the Hudson & Manhattan Railroad, in New York City, is today, more than ever before, a necessary auxiliary to Pennsylvania Railroad transportation service.

IV

In III (g), petitioner makes the following statement:

> "(g) Finally, the petitioner was, and is, of the opinion that a 10 cent fare on its downtown line should enable petitioner to obtain from The Pennsylvania Railroad Company a division of the joint fare between Newark and Hudson Terminal on the joint rapid transit service of petitioner and that Company not less than the division which petitioner obtains of the joint fare

on such service between Newark and points on the uptown line of petitioner, instead of its present division of 7.64 cents of the joint fare on such service between Newark and Hudson Terminal."

We respectfully submit that petitioner is in error in assuming that the divisions of the joint fares necessarily must be controlled by the measure of local fares. Secondly, petitioner assumes that a more favorable divisional set-up would be limited to the downtown line. Probably with greater justification, authority and merit, petitioner should [fol. 663] improve its revenue position by an adjustment of the present division of the joint fares on its uptown service.

The service that petitioner performs for the Pennsylvania Railroad definitely differs from its local performance. Other means of transportation are available locally, as petitioner has well pointed out, but the joint service with the Pennsylvania Railroad must be continued just so long as the saturation point exists at Pennsylvania Station.

One of the fundamental questions presented to the Commission is whether or not the local patrons, resident in Jersey City, are to support the Hudson & Manhattan Railroad in its entirety, when it is well known that this property, and particularly its uptown line, is being maintained for the Pennsylvania Railroad. Those passengers of this latter carrier who insists upon using the Pennsylvania Railroad pay a surcharge for such privilege. *Davis* v. *Pennsylvania R. Co.*, 226 I. C. C. 723. This deterrent diverts substantial Pennsylvania Railroad passenger traffic to the Hudson & Manhattan Railroad. *The Pennsylvania Railroad has received an increase of* 10 *per cent in its passenger fares, including those to and from Hudson & Manhattan Railroad Stations, but apparently the Hudson & Manhattan Railroad has not benefited thereby.* On the contrary, it still persistently seeks to exact from the people of Jersey City an increase in local fares, of 25 per cent.

Denial, by the Commission, of the present application for increased fares should well be construed as a reiteration of the Commission's admonition of July 11, 1938, to the effect that, if petitioner "should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic."

[fol. 664]

V

In support of its application for increased fares (IX), petitioner refers to

> "the continuing economic depression and continuing loss of rail traffic generally, particularly by rail carriers serving the New York City-New Jersey commutation area, and increased competition of private automobiles and of motor buses using the various trans-Hudson facilities, particularly the George Washington Bridge and the Lincoln and Holland Tunnels."

Had the above statement been made prior to Pearl Harbor, the language may have been appropriate; but surely, in this year of 1942, with its gas rationing and dearth of rubber, the facts are to the contrary. Rail traffic is at a peak and private automobile service is being rapidly reduced to a minimum. Additionally, the Central Railroad of New Jersey and the Erie Railroad have wholly abandoned their cross-Hudson uptown ferry services. The principal means of transportation available to both the suburban and non-suburban uptown passenger traffic of these carriers is by use of the facilities of the respondent. The Central Railroad of New Jersey's 23rd Street service ceased in October, 1941, and abandonment of that of the Erie Railroad was authorized by the Commission as of July 3, 1942. (See Finance Dockets Nos. 13351 and 13569.) Incidentally, this new passenger patronage will move at full local fare of 10 cents on the uptown line, and thus will be in excess of the revenues accruing to the petitioner from its Pennsylvania Railroad passenger traffic.

[fol. 665] The volume of petitioner's passenger service is being further augmented by a definite industrial pick-up in the area served by the Hudson & Manhattan Railroad. In lower Manhattan, there has been a substantial increase in office population and, balancing this, northern New Jersey has had a tremendous expansion of plants engaged in war industry.

VI

The time available to protestant, under the Rules of Practice, is not sufficient to permit exhaustive analysis of petitioner's traffic and revenues. Furthermore, these reflect

a pre-war period and thus are not representative of present conditions. More important, the failure of the petitioner to seek increased revenue from its joint rapid transit service with the Pennsylvania Railroad in line with the Commission's admonition of July 11, 1938, should be sufficient to deny the petition for re-opening and the application for an increase in fare.

The petition for re-opening and further hearing and the application for an increase in fares should be denied.

Respectfully submitted, Charles A. Rooney, Milton P. Bauman, For Protestant.

Charles Hershenstein, of Counsel.

[fol. 666] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties to this proceeding, by mailing a copy thereof, with postage prepaid, to each party of record.

Dated at Jersey City, N. J., this — day of July, 1942.

Milton P. Bauman, for Protestant.

[fol. 667] HUDSON AND MANHATTAN EXHIBIT "6"

October 17, 1942

Honorable W. P. Bartel
Secretary
Interstate Commerce Commission
Washington, D. C.

Re: Passenger fares of Hudson & Manhattan Railroad Company, Investigation and Suspension Docket No. 4394.

MY DEAR MR. BARTEL:

By order of October 14, 1942, the Director of Economic Stabilization designated the Price Administrator of the Office of Price Administration "as the representative of the Director of the Economic Stabilization to receive notices of increases in common carrier or other public utility rates and charges," and to do other things necessary to effectuate the provisions of Paragraph 4 of Title

VI of Executive Order No. 9250 and of Section 1 of the Act of October 2, 1942 (Public Law 729, 77th Cong. 2nd Sess.).

As far as we can determine, the Hudson & Manhattan Railroad Company has not given the Director of Economic Stabilization, or his designated representative, notice of the proposed increase in rates and charges, nor, insofar as the Director is informed, has it given its consent to his timely intervention in the proceeding before this Commission at the above entitled docket, as required by said Act of October 2, 1942.

In consideration of the foregoing facts, and without waiving any right which the Director of Economic Stabilization may have to intervene or request reopening of this proceeding, it is requested that we be granted thirty days from the date of receipt of the notice required by said Act of October 2, 1942, in which to file a brief on behalf of the Director of Economic Stabilization.

Very truly yours, Harry R. Booth, Utilities Counsel, Legal Division, Office of Price Administration.

cc: J. E. Buck, General Counsel, Hudson & Manhattan Railroad Co.

[fol. 668] HUDSON AND MANHATTAN EXHIBIT "7"

To the Price Administrator of the Office of Price Administration, as representative of the Director of Economic Stabilization under Directive No. 1 of the Office of Economic Stabilization:

Hudson & Manhattan Railroad Company, a common carrier, hereby gives you notice that there is pending before the Interstate Commerce Commission a proceeding known as "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company," which was initiated by an order of said Commission made August 17, 1937, and reopened by an order of said Commission made July 13, 1942, and in which proceeding said Hudson & Manhattan Railroad Company seeks an order of said Commission authorizing it to publish and charge a 10 cent charge or fare between the station of said Company at Hudson Terminal, New York, New York, and its stations in Jersey City and Hoboken, New Jersey, which proposed

charge or fare, if authorized, would represent an increase over the 8 cent charge or fare now in effect between said stations of said Company, Hudson & Manhattan Railroad Company hereby consents to the timely intervention by you before the Interstate Commerce Commission in such proceeding.

Such notice and consent are given without prejudice to the position of Hudson & Manhattan Railroad Company that nothing in the Act of October 2, 1942 (Pub. Law 729, 77th Cong.), "An Act to amend the Emergency Price Con-
[fol. 669] trol Act of 1942, to aid in preventing inflation, and for other purposes," and nothing in Executive Order No. 9250 of October 3, 1942, requires said Company to give such notice to you or to consent to such intervention by you, or entitles you to such notice or authorizes your intervention in said proceeding.

Hudson & Manhattan Railroad Company, by Walter F. Brown, Chairman of the Board.

November 9, 1942.

John E. Buck, E. Fontaine Brown, John F. Finerty, Cravath, deGersdorff, Swaine & Wood, of Counsel.

Service of the foregoing notice and consent is hereby acknowledged.

——— ———, Price Administrator of the Office of Price Administration, as representative of the Director of Economic Stabilization under Directive No. 1 of the Office of Economic Stabilization.

November —, 1942.

[fol. 670] HUDSON AND MANHATTAN EXHIBIT "11"

Investigation and Suspension Docket No. 4394

Passenger Fares—Hudson & Manhattan Railroad

STIPULATION

Whereas the hearings and taking of testimony in the captioned proceeding were concluded on September 19, 1942, and

Whereas the parties hereto have agreed to supplement or otherwise bring the record up to date to the extent of

showing the total patronage and revenues of the Hudson & Manhattan Railroad for the months of January and February, 1943,

Now therefore the parties hereto stipulate that the following Hudson & Manhattan Railroad figures and revenues should be incorporated into the record and made a part hereof:

	Total Number Passengers	Total Revenue
January, 1943	7,012,492	$577,342.66
February, 1943	6,591,481	$543,554.38

Hudson & Manhattan Railroad Company (original signed) by John F. Finerty, New Jersey Protestants. By S. S. Eisen, Office of Price Administration. By Harry R. Booth.

April 20, 1943.

[fol. 671] Interstate Commerce Commission Exhibit "1"

Order

Interstate Commerce Commission

Docket No. 4394

Investigation and Suspension

Passenger Fares of Hudson & Manhattan Railroad Company

Present: Claude R. Porter, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding and the request of the Office of Price Administration for leave to file a brief therein on behalf of the Director of Economic Stabilization:

It is ordered, that the Director of Economic Stabilization or his designated representative, the Price Administrator of the Office of Price Administration be, and he is hereby, authorized to intervene in the above-entitled pro-

ceeding and to file a brief therein on or before December 9, 1942.

Dated at Washington, D. C., this 13th day of November, A. D. 1942.

A true copy.

By the Commission, Commissioner Porter.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 672] INTERSTATE COMMERCE COMMISSION EXHIBIT "2"

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of July, A. D. 1942.

Docket No. 4394

INVESTIGATION AND SUSPENSION

Passenger Fares of Hudson & Manhattan Railroad Company

Upon consideration of petition of respondent Hudson & Manhattan Railroad Company for reopening, for further hearing, etc., and of the replies thereto; and upon further consideration of the record in the above-entitled proceeding:

It is ordered, that this proceeding be, and it is hereby, reopened for further hearing at such time and place to be hereafter fixed.

By the Commission:

A true copy.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 673] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 18, 1944

Appellants Interstate Commerce Commission and Hudson & Manhattan Railroad Company, for their statement of the points on which they intend to rely on their joint appeal to this Court from the final decree granting a permanent injunction entered by the District Court of the United States for the District of New Jersey on January 14, 1944, hereby adopt the points contained in their Assignment of Errors dated February 9, 1944, heretofore filed herein.

* * * * * * *

[fol. 673a] Designation of Parts of Record to Be Printed

Original complaint, filed September 13, 1943, (omitting therefrom Exhibits 1 to 5, inclusive, attached thereto).

Order convening statutory court and setting case for hearing on September 21, 1943, on application for interlocutory injunction based on original complaint, filed September 14, 1943.

Answer of Interstate Commerce Commission to original complaint, filed September 25, 1943.

Motion by plaintiff for leave to file amended complaint, filed November 18, 1943 (omitting therefrom the amended complaint attached thereto).

Order of Court granting plaintiff leave to file amended complaint, filed November 18, 1943.

Amended complaint filed November 18, 1943 (omitting therefrom Exhibits 1 to 7, inclusive, attached thereto).

[fol. 673b] Motion for leave to file petition for leave to intervene by OPA and Director of Economic Stabilization, filed November 19, 1943 (omitting therefrom the petition for leave to intervene attached thereto).

Petition for leave to intervene by OPA and Director of Economic Stabilization, filed November 19, 1943 (omitting therefrom Exhibit A attached thereto).

Order of Court granting petition for leave to intervene by OPA and Director of Economic Stabilization, filed November 24, 1943.

Answer of Hudson & Manhattan Railroad Company to amended complaint, filed December 6, 1943 (omitting therefrom Exhibits A and C attached thereto).

Answer of Interstate Commerce Commission to amended complaint, filed December 1, 1943.

Answer of United States of America to amended complaint, filed November 24, 1943.

Answer of Hudson & Manhattan Railroad Company to petition of OPA and Director of Economic Stabilization, filed December 9, 1943.

Answer of Interstate Commerce Commission to intervening petition of OPA and Director of Economic Stabilization, filed December 4, 1943.

Amended answer of Interstate Commerce Commission to amended complaint and to intervening petition, filed December 11, 1943.

Affidavit of Walter F. Brown, dated November 24, 1943.

Affidavit of Arthur Potterton, dated November 26, 1943.

Per curiam opinion on interlocutory injunction, dated November 26, 1943.

Findings of Court and order, dated November 26, 1943.

[fol. 673c] Transcript of hearing before three-judge court, December 14, 1943, on application for permanent injunction.

Opinion of Court with respect to permanent injunction, filed January 12, 1944.

Findings of Fact and Conclusions of Law with respect to permanent injunction, entered by Court on January 12, 1944.

Final decree granting permanent injunction, dated January 14, 1944.

Notice of appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from permanent injunction.

Petition for appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company from permanent injunction, filed February 9, 1944.

Assignments of Error of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad Company, filed February 9, 1944.

Order allowing appeal of defendants Interstate Commerce Commission and Hudson & Manhattan Railroad

Company from permanent injunction, filed February 9, 1944.

Notice to Attorney General of State of New Jersey.

Order of Judge Meaney, dated February 9, 1944, directing the Clerk to transmit original record to Supreme Court of the United States.

Praecipe for consolidated transcript of record (including stipulation of parties with respect thereto).

All docket entries in their appropriate order.

Appellants further state that the originals of the documents identified in appellants' Praecipe for Consolidated Transcript of Record as Exhibits P-1 to P-9, inclusive, Intervenor's Exhibits 1 to 4, inclusive, Exhibits for H & M D-1 to D-11, inclusive, and Exhibits for I.C.C. D-1 to D-3, inclusive, as filed of record with the District Court of the United States for the District of New Jersey and which have been transmitted to and filed with this Court as origi-[fol. 673d]-nal exhibits, pursuant to the order of said District Court dated February 9, 1944, are necessary for the consideration of the points on which appellants intend to rely on their respective appeals.

Appellants understand, however, that since said District Court, under the authority of Section 47a of Title 28, U.S.C. (Jud. Code 210), has transmitted said Exhibits to this Court on appeal, as part of the original record before said District Court, under the practice of this Court said Exhibits are before this Court for all purposes, and that it is unnecessary for appellants or any other party to designate said Exhibits or any of them for printing, either to insure the consideration of said Exhibits by this Court or to enable appellants or any other parties to print or refer to said Exhibits or any part thereof on brief and argument, as fully as if said Exhibits were designated for printing.

Appellants and appellees, however, believe that it will serve the convenience of this Court, as well as of the parties, to have certain of said Exhibits designated for printing. Accordingly, they have entered into a stipulation, which is being filed herewith, for the printing of certain of said Exhibits, and for the right of all parties on brief and argument to rely upon and to refer to those Exhibits not designated for printing, as fully as if the same were so designated.

In accordance with such stipulation, the appellants designate all of the following Exhibits for printing:

Plaintiff's Exhibit	P-2
" "	P-3
" "	P-4
" "	P-5
" "	P-6
" "	P-7
" "	P-8

[fol. 673e]

Intervenor's Exhibit	1
" "	2
" "	3
H & M Exhibit	D-1
" "	D-2
" "	D-3
" "	D-4
" "	D-6
" "	D-7
" "	D-11
I.C.C. Exhibit	D-1
" "	D-2

In accordance with such stipulation, the appellants also designate for printing:

(a) The within Statement of Points on Which Appellants Intend to Rely and Designation of Parts of Record to Be Printed; and

(b) The Stipulation with Respect to Printing of Record, etc. (including Schedule A thereto), dated March 17, 1944, between counsel for the appellants and counsel for the appellees, filed herewith.

Dated March 17, 1944.

Daniel W. Knowlton, Chief Counsel; E. M. Reidy, Assistant Chief Counsel for Appellant Interstate Commerce Commission; John F. Finerty, Counsel for Appellant, Hudson & Manhattan Railroad Company.

[fol. 673f] Service of the foregoing Statement of Points on Which Appellants Intend to Rely and Designation of

Parts of Record to be Printed is hereby accepted, and the receipt of a copy thereof is hereby acknowledged, this 17th day of March, 1944.

Chas. G. Hershenstein, Counsel for Appellee, City of Jersey City.

Service of the foregoing Statement of Points on Which Appellants Intend to Rely and Designation of Parts of Record to be Printed is hereby accepted, and the receipt of a copy thereof is hereby acknowledged, this 20th day of March, 1944.

Richard H. Field, Acting General Counsel; David F. Cavers, Assistant General Counsel; Harry R. Booth, Utilities Counsel; Counsel for Appellee; Fred M. Vinson, Economic Stabilization Director by Chester Bowles, Price Administrator.

[fol. 673g] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION WITH RESPECT TO PRINTING OF RECORD, ETC.

The parties hereto understand that, since the District Court of the United States for the District of New Jersey, under the authority of Section 47a of Title 28 U. S. C. (Jud. Code 210), has by order dated February 9, 1944, transmitted to the Supreme Court of the United States on appeal, as part of the original record before said District Court, the documents filed with said District Court on December 15, 1943, identified in appellants' praecipe for consolidated transcript of record and in said order as Exhibits P-1 to P-9, inclusive. Intervenor's Exhibits 1 to 4, inclusive, Exhibits for H & M D-1 to D-11, inclusive, and Exhibits for I. C. C. D-1 to D-3, inclusive, said Exhibits are, under the practice of the Supreme Court of the United States, before that Court for all purposes; further, that, under such practice, it is unnecessary for appellants or any other party to designate said Exhibits or any of them for [fol. 673h] printing, either to insure full consideration of said Exhibits by the Supreme Court, or to enable appellants or any other party to print or refer to said Exhibits or any part thereof on brief and argument, as fully as if said

Exhibits were designated for printing in accordance with Rule 13(9) of the Revised Rules of the Supreme Court of the United States.

The parties hereto believe, however, that it will serve the convenience of the Supreme Court of the United States, as well as of the parties, to have certain of said Exhibits designated for printing.

It is accordingly stipulated and agreed that:

(1) Appellants shall designate all of the following exhibits for printing:

Plaintiff's Exhibit P-2
" " P-3
" " P-4
" " P-5
" " P-6
" " P-7
" " P-8
Intervenor's Exhibit 1 (Including Exhibit C attached thereto)
" " 2
" " 3
H & M Exhibit D-1
" " D-2
" " D-3
" " D-4
" " D-6
" " D-7
" " D-11
I. C. C. Exhibit D-1
" " D-2

(2) The following exhibits shall not be printed:

Plaintiff's Exhibit P-1
" " P-9
Intervenor's Exhibit 4
H & M Exhibit D-5
" " D-8
" " D-9
" " D-10
I. C. C. Exhibit D-3

Plaintiff's Exhibit P-1 consists of a complete transcript [fol. 673i] of the proceedings before the Interstate

Commerce Commission pursuant to its order of July 13, 1942, reopening on petition of Hudson & Manhattan Railroad Company the proceeding entitled "Passenger Fares of Hudson & Manhattan Railroad Company, Investigation and Suspension Docket No. 4394," and comprises, in addition to the transcript of the stenographic notes of the hearings held before said Commission, various exhibits filed at said hearings. For purposes of convenient identification, there is annexed hereto as Schedule A a complete list of the exhibits and other documents comprised in said Exhibit P-1.

(3) Any party hereto may, on brief and argument, print or refer to any or all of the Exhibits designated in paragraph 2 hereof (including the various exhibits compriesd in Exhibit P-1), or any part of such Exhibits, as fully and with the same force and effect as if such Exhibits had been designated for printing under Rule 13(9) of the Revised Rules of the Supreme Court of the United States.

(4) Those Exhibits which, in accordance with this stipulation, are not designated for printing, shall, so far as the Supreme Court of the United States and the parties to these proceedings are concerned, be deemed before the Court for all purposes, as fully as if such Exhibits had been designated for printing and had been actually printed in accordance with Rule 13(9) of the Rexised Rules of the Supreme Court of the United States.

(5) Appellants shall also designate for printing (a) their Statement of Points on Which Appellants Intend to Rely and Designation of Parts of Record to be Printed, dated March 17, 1944, and (b) this Stipulation with Respect to Printing of Record, etc.

[fol. 673j] (6) The undersigned appellees hereby consent to a hearing on the parts of the record designated by the appellants in their Statement of Points on Which Appellants Intend to Rely and Designation of Parts of Record to be Printed, dated March 17, 1944, and hereby waive any right which they might have, pursuant to Rule 13(9) of the Revised Rules of the Supreme Court of the United States, to designate for printing any additional parts of the Record.

It is further stipulated and agreed that any party hereto may, on brief and argument, print or refer to any part of

the transcript of record before the Supreme Court of the United States filed December 13, 1940, in the action entitled "Hudson & Manhattan Railroad Company, Appellant, v. The United States of America, Interstate Commerce Commission and City of Jersey City, Appellees, October Term 1940, No. 628," on appeal from the District Court of the United States for the District of New Jersey, as fully and with the same force and effect as if such transcript of record were part of the transcript of record before the Supreme Court of the United States on the present appeals herein.

Dated March 17, 1944.

Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel for Appellant Interstate Commerce Commission. John F. Finerty, Counsel for Appellant Hudson & Manhattan Railroad [fol. 673k] Company. Charles Rooney and Chas. G. Hershenstein, Counsel for Appellee City of Jersey City. Richard H. Field, Acting General Counsel. David F. Cauers, Assistant General Counsel. Harry R. Booth, Utility Counsel. Counsel for Appellee Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator.

[fol. 673l] SCHEDULE A

List of exhibits and other documents comprised in Plaintiff's Exhibit P-1

(1) Transcript of stenographic notes of hearings held before Interstate Commerce Commission at New York, N. Y., on September 9, 10, 11, 12, 17, 18 and 19, 1942, consisting of pages 1011 to 1928, inclusive, at Washington, D. C. on April 20, 1943, consisting of pages 1929 to 2031, inclusive and at Washington, D. C., on September 28 and 29, 1943, consisting of pages 2032 to 2477, inclusive.

(2) Supplement to Petition of Hudson & Manhattan Railroad Company for reopening of proceedings, for a further hearing and for leave to publish and charge a 10-cent fare between Hudson Terminal, New York, and stations in Jersey City and Hoboken, New Jersey, consisting of the following exhibits, received in evidence at the hearings be-

fore the Interstate Commerce Commission in September, 1942:

Ex. No.	Description
5-R	Statement and Charts Showing Number of Passengers Carried Annually on H. & M. Lines 1919 to 1941, inclusive, Grand Total and By Routes, and Trans-Hudson Passenger Traffic 1925 to 1940, inclusive.
25-R	Cost of Construction of Railroad Properties to December 31, 1941.
26-R	Summary of Bonds Outstanding in Hands of the Public December 31, 1941, Apportioned to Railroad Property and to Hudson Terminal Buildings and Other Real Estate Not Used in Railroad Operations; Annual Interest Thereon; Statements of Income, By Years, for the Period January 1, 1938 to December 31, 1941, inclusive, for— All operations Hudson Terminal Buildings and Other Real Estate Operations Railroad Operations
27-R	Materials and Supplies on Hand December 31, 1941.
28-R	Record of Interest and Dividend Payments from 1938 to 1941, inclusive.
30-R	Local Fares on Hudson & Manhattan R. R. from 1938 to 1941. Fares on Joint Rapid Transit Electric Train Service between New York, N. Y. (H. & M.) and Newark, N. J. (P. R. R.) from 1938 to 1941, inclusive, and Divisions of Such Fares Received by Hudson & Manhattan R. R.

[fol. 673m]

Summary of Passenger Traffic and Revenue for Four Years 1938 to 1941, and Analysis of Each of Such Years.

Ex. No.	Description
36-R	(a) Passengers Carried by Classes of Fares (b) Passenger Statistics—Summary of Passengers Carried by Stations of Origin. (c) Number of Passengers Carried In and Out of New York on the Different Trunk Line Railroads Compared with Total Number of Interstate Passengers Carried on Hudson & Manhattan Railroad. (d) Segregation of Income Applicable to Railroad Operations Between Downtown and Uptown Services, Calendar Year 1941. (g) Cost of Various Forms of Tickets and the Rates Per Ride for Hauls of Five Miles or Less on Trunk Line Railroads Serving New York City. (h) Comparison of Rail and Bus Fares Between Typical Points in New Jersey and Common Territories in New York City.
A	Comparison of Volume of Traffic for the Period January 1, 1942 through June 20, 1942 with the Corresponding Period of the Year 1941.
B	Comparison of Operating Expenses, Taxes and Car-Miles—1937 and 1941.

(3) The following exhibits received in evidence at the hearings before the Interstate Commerce Commission in September, 1942:

4-R	Mileage table showing distances between stations and points on Hudson & Manhattan R. R. and, also, between such stations and Harrison and Newark on the Pennsylvania Railroad.
5-R Am Sheet 2	Chart showing grand total of passengers carried by years, 1920 to 1941, average number of passengers for years 1924-1937, inclusive, 1919-1941, inclusive, 1933-1941, inclusive, and 1937-1941, inclusive.
5-R Supp 1	Trans-Hudson passenger traffic and railroad passengers using railroad tunnels, 1941.

Ex. No.	Description
5-R Supp 2	Trans-Hudson vehicular traffic for 8 months of 1941 and 1942.

[fol. 673n]

5-R Supp 3	Trans-Hudson passenger traffic by bus for 8 months of 1941 and 1942.
26-R Supp	Summary of bonds outstanding in hands of the public, August 31, 1942, apportioned to railroad property and to Hudson Terminal Buildings and other real estate not used in railroad operations; annual interest thereon; and Statements of income for the period January 1 to August 31, 1942, inclusive, for All operations Hudson Terminal Buildings and other real estate operations Railroad Operations
30-R Supp Sh. 2	Fares on New York-Newark joint rapid transit lines, January 1 to August 1, 1942, and divisions of fares received by Hudson & Manhattan R. R.
30-R Supp Sh. 3	Summary of passenger traffic and revenues for 8 months January 1 to August 31, 1942.
33-R	Average headway of trains, Sunday schedule, Winter Period, 1942-1943. Average headway of trains, Weekday schedule, Monday to Friday, Winter Period, 1942-1943. Average headway of trains, Saturday schedule, Winter Period, 1942-1943.
34-R	Tabulation showing maximum traffic periods and service, August 19, 1942.
37-R	Tabulation of Hudson & Manhattan R. R. Maximum Traffic Periods & Service, Downtown Line, August 19, 1942.
38-R	Tabulation of Hudson & Manhattan R. R. Maximum Traffic Periods & Service, Uptown Line, August 19, 1942.

Ex. No.	Description
86-R	Tabulation of Hudson & Manhattan R. R. Passenger Traffic & Car Service, Downtown Line and Uptown Line during 24 hours, August 19, 1942.
A Supp	Comparison of volume of traffic for period June 1 through August 31, 1942, with corresponding period of the year 1941.
C	Tabulation showing number of Military and Naval passengers using Hudson & Manhattan R. R., also number of civilians who accompanied such Military and Naval passengers, August 2 to August 9, 1942, inclusive.

[fol. 673o]

D	Copy of letter sent to Interstate Commerce Commission by Mr. W. F. Brown, as Chairman of the Board of Hudson & Manhattan, dated July 15, 1938, re 8¢ fare.
E	Copy of Hudson & Manhattan Local Passenger Tariff No. 44.
F	Copies of correspondence between John F. Finerty and J. Carter Fort of the Association of American Railroads, re inclusion of Hudson & Manhattan in Ex Parte 148 proceedings.
G	Tabulation showing rate of return from railroad operations at specified traffic levels based on 8 cent downtown fare; Tabulation showing rate of return from railroad operations at specified traffic levels based on a downtown fare of 10¢ and assuming an initial loss of 12% in traffic affected by fare increase.
H	Statement showing one-way, round-trip and commutation fares between Pennsylvania Railroad stations at Newark and Harrison, New Jersey and Hudson & Manhattan stations in New York and New Jersey from commencement of joint service in 1911 to August 31, 1942; divisions of such fares received by Hudson & Manhattan and

Ex. No.	Description
H	passenger fares per mile in effect on steam railroads in the eastern district of the United States during the same period.
I	Form used by Hudson & Manhattan Conductors and Collectors for reporting total number of revenue passengers using joint service trains between Harrison and Journal Square.
J	Form used for summarizing information reported on Exhibit "I".
K-Day L-Night	Forms used for reporting count of passengers who get off east-bound joint service trains at Journal Square.
M	Form used for recording count of revenue passengers and pass passengers who board westbound joint service trains at Journal Square.
N	Exit coupon.
O	Form on which exchange tickets are recorded.
O-1	Exchange ticket.
P	Form used for daily report of Punch Registrations.

[fol. 673p]

Q	Copy of bill rendered by Hudson & Manhattan to Pennsylvania Railroad for divisions.
R	Tabulation showing trans-Hudson passengers handled by railroad ferries at New York segregated by railroad and local passengers, 1935 to 1941.
S	Analysis and restatement of Protestants' Exhibit F-105—Gains and Losses Peak and Non-Peak Hours Traffic 1938 and 1942, based on typical day in February 1938 and August 19, 1942.
T	Letter, dated September 28, 1942, from Mr. J. E. Buck, General Counsel of Hudson & Manhattan Railroad Company, to Examiner R. N. Trezise of the Interstate Commerce Commission, setting

Ex. No.	Description
T	forth data respecting the time when Hudson & Manhattan Railroad Company acquired the $1,701,500 par value of its First Lien & Refunding Mortgage 5% Bonds, as testified to by Mr. Walter F. Brown.
U	Analysis of Passenger Traffic of Hudson & Manhattan Railroad Company for the eight months ended August 31, 1937, and 1942.
F-87	Statement showing comparison of Hudson & Manhattan passengers carried with passenger car miles, 1927 and 1937 to 1941.
F-88	Statement showing Hudson & Manhattan trend in passenger traffic 1937 to 1942.
F-89	Statement showing comparison of Hudson & Manhattan loss or gain in local traffic originated in New Jersey 1937—1941.
F-90	Statement showing population of Hudson County, New Jersey, by cities, year 1940.
F-91	Statement showing cross-Hudson automobile traffic 1938 to 1941, inclusive.
F-92	Statement of New Jersey Bus Transportation Companies, the areas served by them and their local fare to the Central Railroad of New Jersey ferry.
F-93	Chart showing comparison of distances between Hudson & Manhattan stations in Jersey City and in New York City, with passengers originated in 1941.
F-94	Statement of New Jersey Bus Transportation Companies, the areas they serve, and their local fares to the Erie ferry.
F-95	Statement of New Jersey Bus Transportation Companies, the areas they serve, and their local fares to the Pennsylvania Railroad ferry.

[fol. 673q]

Ex. No.	Description
F-96	Statement of New Jersey Street Railway and Bus Transportation facilities, the area served by them and their local fares to the Delaware, Lackawanna & Western ferry.
F-97	Public Service New-Departure Transit Guide, Fare — Time — Route Numbers, in Hudson County from Journal Square.
F-98	Comparison of present ferry fares applicable in New York harbor.
F-99	Comparison of Hudson & Manhattan Downtown local traffic with railroad ferry local passenger traffic (other than ex-railroad), 1937—1941.
F-100	Comparison of Hudson & Manhattan Downtown Local traffic with railroad passengers carried by ferries, 1937—1941.
F-101	Jersey Central Railroad Time Table, New York —Newark and Elizabeth, Roselle—Roselle Park, etc.
F-102	Pennsylvania Railroad commutation fares for 60-trip Monthly, 12-trip Weekly, 50-trip Family tickets between New Brunswick to Newark, New Jersey, and New York, N. Y.. One-way coach fares between New York and same points in New Jersey.
F-103	Comparison of Gain or Loss in passengers to, from or within New Jersey, 1937 versus 1939, by classes of traffic, with gain or loss of cross-Hudson traffic of Erie, Delaware, Lackawanna & Western, Pennsylvania Railroad and Central Railroad of New Jersey.
F-104	Statement showing Hudson & Manhattan loss in local passengers originated in New Jersey 1937 versus 1939 by stations of origin.
F-105	Analysis of Hudson & Manhattan traffic and revenue for a typical day in 1938 and 1942— Gains or loss in interline and local traffic; Gains or loss in peak and non-peak hours;

Ex. No.	Description
F-105	Gains or loss in revenue on local downtown traffic during peak and non-peak hours.
F-106	Comparison of Hudson & Manhattan revenue gains from 8¢ fare with cost to downtown passengers—using calendar year 1937 as base.
F-107	Comparison of Hudson & Manhattan railway operating expenses and taxes—1937 to 1941.

[fol. 673r]

F-108	Comparison of additional passenger revenue (at 2¢ per passenger) paid by downtown passengers with increases in operating expenses and taxes incurred by Hudson & Manhattan for the calendar years 1938 to 1941. The year 1937 is used as a base.
F-109	Comparison of increases in operating expenses and taxes incurred by Hudson & Manhattan for the calendar years 1938 to 1941 with additional revenue, if any, received from interline traffic. 1937 used as base.
F-110	Estimate of revenue gains to Hudson & Manhattan and cost to passengers on proposed 10¢ fare predicated on additional diversion of downtown passenger traffic as result of such increase, using 1941 as base.
F-111	Hudson & Manhattan revenue, traffic and transportation statistics—downtown and uptown.
F-112	Comparison of downtown fares and Hudson & Manhattan proportion of joint fares, 1919 to 1942.
F-113	Comparison of revenues received by Hudson & Manhattan for transporting passengers ex trunk line railroads.
F-114	Comparison of revenues, per mile, if ex-Pennsylvania earnings of Hudson & Manhattan were increased 2¢, with earnings received by Hudson & Manhattan on ex-Erie and ex-Delaware, Lackawanna & Western passenger traffic.

Ex. No.	Description
F-115	Comparison of joint fare and division thereof accruing to Hudson & Manhattan from 1919 to 1942, also amount by which Hudson & Manhattan proportion of joint fare was more or less than local fare.
F-116	Comparison of revenue effect of increased fare upon joint traffic of the Hudson & Manhattan and the Pennsylvania Railroad between Newark and New York.
F-117	Hudson & Manhattan statement of net income from all operations, for the years ending December 31, 1941, and June 30, 1942.
F-118	Hudson & Manhattan income account for the years ending June 30, 1941, December 31, 1941, and June 30, 1942.
F-119	Comparative income statement of Hudson & Manhattan for the period June, 1938, to December 31, 1941 (in cents per revenue car mile).

[fol. 673s]

F-120	Relationship of revenue requirements for interest by the Hudson & Manhattan with its operating expenses and taxes, in cents per car mile, calendar year 1940.
F-121	Distribution of gross revenue of 80.96 cents per car mile, Hudson & Manhattan, for calendar year 1940.
F-122	Comparison of gross income and interest requirements of rapid transit lines, in cents per revenue car mile for year ending December 31, 1940.
F-123	Comparison of passenger revenue per mile and operating ratio of Hudson & Manhattan with rapid transit surface lines in New York City for the year 1940.
F-124	Comparison of operating revenue and operating ratio of Hudson & Manhattan with rapid transit

Ex. No.	Description
F-124	surface lines in New York (includes interstate operations) per car or bus miles for year 1940.
F-125	Comparison of operating revenue per car mile and operating ratio, Hudson & Manhattan versus rapid transit sub-surface lines in New York City.
F-126	Hudson & Manhattan statements showing total increase in revenue, 1942 over 1941 (by months), under present fares and divisions.
F-127	Hudson & Manhattan statement showing increase in revenue 1942 over 1941 (by months), under present fares, local traffic and an assumed increase of 2¢ in revenue on inter-line traffic.
F-128	1940 to 1942 Hudson & Manhattan passenger traffic by months, also monthly increase, 1942 over 1941.
F-129	Comparison of passenger revenues in United States and by districts, July 1941 and July 1942.
F-130	Erie Railroad Time Table, Main Line, Newark Branch, Bergen County R. R.
F-131	Erie Railroad Time Table, New York and Greenwood Lake Railway, Orange Branch, Caldwell Branch.
F-132	Erie Railroad Time Table, Northern Railroad of New Jersey, showing Times Square Motor coach connection.
F-133	New Jersey & New York R.R. Co., Suburban Time Table.

[fol. 673t]

F-134	Erie Railroad Time Table, New York, Middletown, Port Jervis and Branches.
F-135	Delaware, Lackawanna & Western Suburban Time Table.
F-136	Jersey Central Railroad Time Table, Newark Branch.

Ex. No.	Description
F-137	Map of route of Central Avenue Bus Company in Jersey City and Hoboken, New Jersey.
F-138	Traffic check taken at Central Railroad ferries, foot of Johnston Avenue, Jersey City, New Jersey, Wednesday, September 9, 1942.
F-139	Corporate Names of Central Avenue Bus Co.
F-140	Corporate Names of Crosstown Bus Line.
F-141	Map of New Jersey Railroads.

(4) The following exhibits received in evidence at the hearings before the Interstate Commerce Commission in September, 1943:

F-142	Report for 1937 of Committee on Fare Structures of the American Transit Commission.
F-143	Bill of Complaint of the City of Jersey City against United States of America et al., dated September 7, 1943.
F-144	Order of Court dated September 14, 1943, setting hearing for Tuesday, September 21, 1943, on application of City of Jersey City for preliminary injunction.
F-145	Copy of letter, dated September 20, 1943, from Mr. Finerty to Judge Meaney stating Hudson & Manhattan would do nothing further until further order of Commission with reference to increasing its fares.
F-146	Copy of letter, dated September 21, 1943, from Judge Meaney to Mr. Finerty acknowledging receipt of letter (F-145).
F-147	Statements showing number of interstate local passengers carried by Hudson & Manhattan during year ended December 31, 1942, divided as between uptown and downtown passengers, the revenue therefrom on basis of present fares, the revenue therefrom on basis of proposed fares of 10 cents cash fare or eleven tokens for $1 with

Ex. No.	Description
F-147	10% of passengers paying cash fare and 90% of passengers using tokens, the increase in downtown revenues and decrease in uptown revenues.

[fol. 673u]

F-148	Statement showing number of interstate local passengers carried by Hudson & Manhattan during year ended August 31, 1943, divided as between uptown and downtown passengers, the revenue therefrom on basis of present fares, the revenue therefrom on basis of proposed fares of 10 cents cash fare or eleven tokens for $1 with 10% of passengers paying cash fare and 90% of passengers using tokens, the increase in downtown revenues and decrease in uptown revenues.
F-149	Statement showing number of interstate local passengers carried by Hudson & Manhattan during eight months ended August 31, 1943, divided as between uptown and downtown passengers, the revenue therefrom on basis of present fares, the revenue therefrom on basis of proposed fares of 10 cents cash fare or eleven tokens for $1 with 10% of passengers paying cash fare and 90% of passengers using tokens, the increase in downtown revenues and decrease in uptown revenues.
F-150	Statement showing number of interstate local passengers carried by Hudson & Manhattan during eight months ended August 31, 1943, adjusted to twelve months basis, divided as between uptown and downtown passengers, the revenue therefrom on basis of present fares, the revenue therefrom on basis of proposed fare of 10 cents cash fare or eleven tokens for $1 with 10% of passengers paying cash fare and 90% of passengers using tokens, the increase in downtown revenues and decrease in uptown revenues.
F-151	Statement showing rate of overloading of Hudson & Manhattan coin collection boxes.

Ex. No.	Description
F-152	Photograph taken at Hudson Terminal of double aisle fare collection boxes.
F-153	Photograph taken at Hudson Terminal of double aisle fare collection boxes.
F-154	Statement showing spot check of token use study.

[fol. 673v] [File Endorsement Omitted]

[fol. 674] SUPREME COURT OF THE UKITED STATES, OCTOBER TERM, 1943

No. 767

ORDER NOTING PROBABLE JURISDICTION—April 3, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 48, 259, 48, 260, D. C. U. S., New Jersey, Term No. 767. The Interstate Commerce Commission and Hudson & Manhattan Railroad Company, Appellants, vs. The City of Jersey City, Fred M. Vinson, Stabilization Director by Chester Bowles, Price Administrator. Filed March 7, 1944. Term No. 766 O. T. 1943, 767 O. T. 1943.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 7 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 766

THE HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

vs.

THE CITY OF JERSEY CITY, FRED M. VINSON, STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

JAMES B. EMORY,
JOHN E. BUCK,
THOMAS A. HALLERAN,
JOHN F. FINERTY,
Counsel for Appellants.

COLLINS & CORBIN,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions	1
The statute of a state, or the statute or treaty of the United States, the validity of which is involved	2
Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented	2
Nature of the case and of the rulings below	2
Cases sustaining the Supreme Court's jurisdiction of the appeal	7
Decree and opinion of the District Court	7
Appendix "A"—Opinion of the District Court	9
Appendix "B"—Findings and order of the District Court	11

Table of Cases Cited.

Alabama v. *United States*, 279 U. S. 229	7
New England Divisions Case, 261 U. S. 184	7
Ohio Oil Company v. *Connelly*, 279 U. S. 813	7
United States v. *Baltimore & Ohio Railroad Company*, 225 U. S. 306	7

Statutes Cited.

United States Code, Title 28, Section 41(28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219)	2
United States Code, Title 28, Sections 43 to 48	3
United States Code, Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938)	2

Page

United States Code, Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220 ..... 1, 3

United States Code, Title 28, Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35, Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938) 2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 3073.

CITY OF JERSEY CITY,

Plaintiff;

and

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR,

Intervenor,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY,

Defendants.

JURISDICTIONAL STATEMENT BY DEFENDANT UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The defendant, Hudson & Manhattan Railroad Company, respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order and decree in the above-entitled cause sought to be reviewed:

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

B. The Statute of a State, or the Statute or Treaty of the United States, the Validity of Which Is Involved.

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The order and decree sought to be reviewed was entered on November 26, 1943. The petition for appeal was presented on December 24, 1943, together with an assignment of errors.

D. Nature of Case and of Rulings Below.

This is an appeal from an order and decree of the District Court of the United States for the District of New Jersey, entered November 26, 1943, granting an interlocutory injunction restraining and enjoining the defendants, United States of America, Interstate Commerce Commission and

Hudson & Manhattan Railroad Company, pending the final hearing in the proceedings entitled above, for a period of fifty days from the date of such order and until a further order of the Court, from putting into effect the report and orders of the Interstate Commerce Commission bearing dates June 8, 1943 and November 2, 1943, in so far as such orders permitted the establishment of any local interstate fare in excess of 8 cents for transportation on the downtown line of defendant, Hudson & Manhattan Railroad Company. The District Court granting such interlocutory injunction was constituted under the provisions of Section 47, Title 28, U. S. C. and consisted of the Honorable Gerald McLaughlin, Circuit Judge, the Honorable Guy L. Fake and the Honorable Thomas F. Meaney, District Judges.

The application for such an interlocutory injunction was based on an amended complaint filed on November 19, 1943, by the City of Jersey City, as plaintiff, purporting to be in accordance with the provisions of Section 41 (28), and Sections 43 to 48, inclusive, of Title 28 U. S. C., and upon a petition for leave to intervene by Fred M. Vinson, Director of the Office of Economic Stabilization by Chester Bowles, Price Administrator of the Office of Price Administration, allowed November 24, 1943.

The reports and orders of the Interstate Commerce Commission against which such interlocutory injunction was granted provided in substance as follows:

The report and order of June 8, 1943 permitted the defendant, Hudson & Manhattan Railroad Company, for the period of the war and six months after the termination thereof to publish and charge as a maximum fare on its downtown line a fare of 9 cents in lieu of the then fare of 8 cents authorized as a maximum reasonable fare by the report, findings and order of the Commission of July 11, 1938, 227 I. C. C. 741.

The report and order of November 2, 1943 modified the report and order of June 8, 1943 to the extent of authorizing the defendant, Hudson & Manhattan Railroad Company, to publish and charge on its downtown line, for the period of the war and for six months after the termination thereof, in lieu of the 9 cent fare authorized by the Commission's report and order of June 8, 1943, alternate fares of eleven tokens for a dollar or a cash fare of a dime, provided said defendant likewise published and charged such alternate fares on its uptown line, in lieu of the fare of 10 cents authorized as a maximum fare on such uptown line by the Commission's report and order of August 9, 1920, 58 I. C. C. 270.

The Commission's report and order of November 2, 1943 were based upon findings after hearing and evidence taken thereon that it was impracticable for the defendant, Hudson & Manhattan Railroad Company, to collect a 9-cent cash fare because of the mechanical limitations of its fare collection boxes, which limitations could not be obviated, and that the only practical means by which said defendant could obtain the revenue which the Commission intended to accord under the 9-cent fare authorized by the Commission's report and order of June 8, 1943, was by means of the alternate tokens and dime fares authorized by the Commission's order of November 2, 1943.

Both the amended complaint and the petition to intervene contained perfunctory allegations that the Commission's orders of June 8, 1943, and November 2, 1943, were without adequate findings or evidence to support them, but the substantive allegations of both were that in making such orders the Commission ignored certain evidence before it and that its conclusions from the evidence before it were erroneous. In addition, both the amended complaint and the petition to intervene alleged in substance that the Commission's order of November 2, 1943, was

made without full hearing by reason of the alleged refusal of the Commission to permit the plaintiff and the intervenor to introduce certain evidence allegedly relevant to the validity of the Commission's orders of June 8, 1943, and November 2, 1943, in permitting any increase in the fare on said defendant's downtown line over the 8-cent fare authorized as a maximum fare by the Commission's order of July 11, 1938. The amended complaint also alleged that:

> "The effectiveness of transportation fares on the downtown line in excess of the reasonable maximum fare of eight cents will create an undue and unjust burden upon the local downtown passenger in violation of the Interstate Commerce Act, and unless the enforcement, operation and execution of the Commission's orders of June 8, 1943, and November 2, 1943, are restrained will cause plaintiff and the members of its body politic great damages as aforesaid for which plaintiff has no adequate remedy at law."

The amended complaint, however, contained no allegation specifying the nature of such damage nor did it contain any allegation that the plaintiff municipality, its officers, agents or employees either had paid or would pay the present 8-cent fare on said defendant's downtown line, or would be subjected to paying the increased fares on that line authorized by the Commission's orders sought to be enjoined. The petition to intervene alleged that:

> "Unless said orders of June 8, 1943, and November 2, 1943, are restrained your petitioners will be caused grave and substantial injury in the performance of their duties under the stabilization legislation."

The intervening petition, however, contained no allegations specifying the nature of such injury nor any allegation that the intervenor, his agents or employees either had paid or would pay the present 8-cent fare on said defendant's downtown line, or would be subjected to paying the increased

fares on that line authorized by the Commission's orders sought to be enjoined.

On hearing of the application for an interlocutory injunction the plaintiff offered no evidence to show that any damage, irreparable or otherwise, could result to the plaintiff from a denial of an interlocutory injunction pending hearing and determination of an application for a permanent injunction, such evidence of alleged damage as the plaintiff did offer being confined to damage which might result from a denial of a permanent injunction. On such hearing the intervenor offered no evidence whatever of damage, irreparable or otherwise.

On such hearing the defendant Hudson & Manhattan Railroad Company introduced evidence by means of an affidavit of Walter F. Brown, Chairman of the Board of Directors and President of such Company, showing (a) that no substantial damage could result to the plaintiff or to the intervenor by the denial of an interlocutory injunction as shown by the facts recited in such affidavit; (b) that irreparable damage of approximately $1,000 per day would result to the defendant Hudson & Manhattan Railroad Company by the granting of an interlocutory injunction during the entire period of such injunction; (c) that the maximum damage which could result to any passenger upon the downtown line of the defendant Railroad Company by a denial of an interlocutory injunction would not exceed 54-5/11 cents per month; (d) that passengers upon the uptown line of said defendant Railroad Company would benefit to the extent of 45-5/11 cents per month should an interlocutory injunction be denied, by reason of the reduction in the existing 10-cent fare on the uptown line authorized by the Commission's order of November 2, 1943; and (e) that he was advised by counsel that the plaintiff could not give a valid bond to protect the Railroad Company from the damage of approximately $1,000 per day which

would result from the granting of an interlocutory injunction in the event a permanent injunction should finally be denied.

The Court, nevertheless, found that irreparable damage would result both to the plaintiff and to the intervenor by the denial of an interlocutory injunction and thereupon granted such an injunction. Moreover, the Court upon granting such interlocutory injunction refused to require the plaintiff to give security for the payment of such costs and damages as might be incurred or suffered by the defendant Hudson & Manhattan Railroad Company should such defendant be found to have been wrongfully enjoined or restrained, although the defendant, Hudson & Manhattan Railroad Company, requested that such security be given as required by Rule 65(c) of the Federal Rules of Civil Procedure.

The defendant Hudson & Manhattan Railroad Company submits that, by reason of the premises and for the further reasons set forth in detail in the assignment of errors filed herein, the Court was guilty of an abuse of discretion and committed errors of law in granting such interlocutory injunction.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.

Alabama v. *United States*, 279 U. S. 229;
Ohio Oil Company v. *Connelly*, 279 U. S. 813;
New England Divisions Case, 261 U. S. 184;
United States v. *Baltimore & Ohio Railroad Company*, 225 U. S. 306.

F. Decree and Opinion of the District Court.

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated, December 24, 1943.

Respectfully submitted,

COLLINS & CORBIN,
By JAMES B. EMORY,
A Member of the Firm;
JOHN E. BUCK,
THOMAS A. HALLERAN,
JOHN F. FINERTY,
Attorneys for Plaintiff.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Civil No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervenor*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants.*

Per Curiam Opinion.

APPEARANCES:

Charles E. Hershenstein, Esq., Charles A. Rooney, Esq., S. S. Eisen, Esq., Attorneys for City of Jersey City.

Edward M. Reidy, Esq., Attorney for Interstate Commerce Commission.

Collins & Corbin, Esqs., by James B. Emery, Esq., John J. Finerty, Esq., Thomas A. Halleran, Esq., John E. Buck, Esq., Attorneys for Hudson & Manhattan Railroad Company.

Harry R. Booth, Esq., Attorney for Office Economic Stabilization, by Chester Bowles, Price Administrator.

McLAUGHLIN, Circuit Judge, and FAKE and MEANEY, District Judges:

It appears upon the face of the record that after hearing and argument a certain order was entered by the Interstate Commerce Commission on June 8, 1943, fixing and establishing certain passenger rates or tariffs on the line of the Hudson & Manhattan Railroad Company between the City of Jersey City and the City of New York, and thereafter, on November 2, 1943, the Commission, for

reasons which appear in the record, increased the said rates or tariffs. It is argued here that both these orders should be enjoined, laying emphasis upon the latter because neither the City of Jersey City nor the Office of Price Administration, which intervened in this proceeding, was afforded an opportunity to cross-examine on the evidence adduced relating to the subject dealt with, and that they were precluded from introducing evidence to meet the issues raised. The Commission's order permits the increase of rates or tariffs to become effective on Monday, November 29, 1943, and we have this day, Friday, November 26, 1943, received briefs and entertained oral arguments covering the issues raised, thus being forced to take action on extremely short notice.

Relating to the rights of the Office of Price Administration, we find the following:

1. It is entitled to intervene herein pursuant to statute. It has done so.

2. It has an interest in that it is charged with the duty of enforcing the stabilization of prices in this critical war period.

3. The consideration of passenger rates is within the sphere of its authority to appear herein, and it has an interest in the rates to the extent that they may affect stabilization.

4. The rights of the Office of Price Administration cannot exhaustively be gone into by this Court in the short space of time between Friday and Monday.

Relating to the rights of Jersey City, it is found:

1. The City of Jersey City is a proper party to these proceedings and has a right to appear and defend, and has acquired a standing as a party before the Interstate Commerce Commission.

2. The City is authorized by law to raise by taxation and spend money so raised to advertise the City as a desirable place in which to locate industries and residences.

The exercise of this right is decreased in value by the increase of rates herein complained of.

It is the opinion of the Court that injunctive relief should be afforded in this cause, staying the operation of the rates and tariffs established as aforesaid and maintaining the status quo ante to the end that a full and complete hearing may be afforded all parties before the said rates and tariffs shall take effect. An interlocutory injunction will therefore be issued, staying the force and effect of the two orders hereinbefore referred to for a period of fifty days hereafter, and the cause is hereby set down for final hearing on the 4th day of January, 1944.

With reference to the necessity of the municipal plaintiff being required to give a bond, as we see it, there is no obligation on the part of such branch of Government to furnish a bond in this proceeding.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Civil No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervenor*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants*.

Interlocutory Injunction and Restraint.

FINDINGS AND ORDER.

This matter coming on to be heard before a statutory court consisting of Honorable Gerald McLaughlin, Judge

of the Circuit Court, and Honorable Guy L. Fake and Honorable Thomas F. Meaney, Judges of the District Court, upon the application of the plaintiffs to enjoin *pendente lite* the orders of the Interstate Commerce Commission bearing dates of June 8, 1943, and November 2, 1943, in the presence of Charles Hershenstein, Charles Rooney and S. S. Eisen appearing for the plaintiff, City of Jersey City, Harry R. Booth appearing for Economic Stabilization Director Vinson and Price Administrator Bowles, intervening plaintiff and John Finnerty and John Buck appearing for the Hudson & Manhattan Railroad Company, and E. M. Reidy appearing for the Interstate Commerce Commission, defendants, and the Court having heard the argument of counsel and considered the briefs, being of the opinion that;

(1) The plaintiffs, City of Jersey City and the Director are proper parties to bring and maintain this proceeding as plaintiffs herein.

(2) That under the Interstate Commerce Act and Acts amendatory thereof, and supplementary thereto, the Interstate Commerce Commission was and is required to afford all parties properly before it a fair and full hearing.

(3) That the City of Jersey City and the Director properly appeared as protesting parties before the said Interstate Commerce Commission and were and are entitled to the aforesaid full and fair hearing.

(4) In addition to the above, the Director, representative of the President, under the Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. (App.), intervened in said proceedings with the consent of the railroad company, defendant herein, as required by law, for the purpose of preventing an increase in the fares of said railroad to the extent that such fares would conflict with the stabilization legislation enacted by Congress, to aid in the prosecution of the War, and under said legislation the Director was entitled to a fair and full hearing.

(5) That the pleadings and the argument herein and the record before the Interstate Commerce Commission discloses that neither said City of Jersey City nor said Director, jointly or individually, was afforded a full and fair hearing by the said Commission, in that they were individually and jointly denied the opportunity to present evidence and testimony, including the right to cross-examine witnesses on material matters of a probative nature bearing upon the right of the said railroad to an increase in its fares over and above those in effect on September 15, 1942, under the said Interstate Commerce Act, Acts amendatory thereof and supplementary thereto, and the said Act of October 2, 1942.

(6) That the national interest requires that the fares of the said railroad be maintained as currently in effect, which present fares are the same as those in effect on September 15, 1942, pending final hearing of this cause.

(7) That irreparable damage to the said City of Jersey City and the said Director will result if the reports and orders of the Interstate Commerce Commission dated June 8, 1943, and November 2, 1943, in this proceeding, are not temporarily restrained and enjoined.

Now Therefore, good cause appearing therefor,

It is on this 26 day of November, 1943, Ordered that the defendants, The United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, be, and they are hereby restrained and enjoined, pending the final hearing in the proceeding entitled above for a period of fifty days from the date of this order, and until the further order of the Court, from putting into effect the report and orders of the Interstate Commerce Commission bearing date June 8, 1943, and November 2, 1943, in so far as such orders permit the establishment of any local interstate fare in excess of 8 cents for transportation on the downtown line of defendant, Hudson & Manhattan Railroad Company.

It is further ordered that final hearing in this cause will be had December 14, 1943, at 10:30 o'clock in the forenoon at the Post Office Building, Newark, N. J.

(S.) GERALD MCLAUGHLIN,
(S.) GUY L. FAKE,
(S.) THOMAS F. MEANEY.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 21 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

against

CITY OF JERSEY CITY, and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

JOHN F. FINERTY
Counsel for Appellant
Hudson & Manhattan Railroad Company

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

To the Honorable the Supreme Court of the United States:

HUDSON & MANHATTAN RAILROAD COMPANY, appellant in the above proceedings, respectfully moves the Court, in the alternative, for:

(a) An order permitting appellant to file in this Court, with leave to all parties without printing to refer thereto on brief and argument on this appeal, a transcript of the official stenographic report of the proceedings had November 24 and November 26, 1943, in the District Court of the United States for the District of New Jersey, before a statutory court consisting of the Honorable Gerald McLaughlin, Circuit Judge, and the Honorable Guy L. Fake and the Honorable Thomas F. Meaney, District Judges, upon the application of the appellees herein for an interlocutory injunction against certain orders of

the Interstate Commerce Commission, which interlocutory injunction was granted by said court on November 26, 1943; or

(b) A writ of certiorari to said District Court requiring said court to certify and transmit to this Court, as part of the record on the above appeal, a true and complete transcript of such official stenographic report.

Said District Court has refused to allow such transcript of the proceedings before the statutory court on the application for an interlocutory injunction to be filed of record in said Court and the transcript of such proceedings, therefore, has been omitted from the transcript of record transmitted to this Court by the District Court on the above appeal and filed in this Court on March 7, 1944.

The grounds in support of said motion are stated in the attached affidavit of John F. Finerty, counsel for appellant, which affidavit is made part of this motion.

As relevant to this motion, said affidavit also states grounds showing that this appeal from the order of the statutory court granting an interlocutory injunction is not rendered moot by the subsequent order of that court granting a permanent injunction in the same proceedings.

JOHN F. FINERTY
Counsel for Appellant
Hudson & Manhattan Railroad Company

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

I hereby certify that on March 20, 1944, I served a true copy of the above motion and of the attached affidavit upon counsel for each of the appellees herein.

JOHN F. FINERTY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. FINERTY, being duly sworn, states as follows:

1. That he is counsel for the appellant on the above appeal.

2. That this affidavit is filed in support of the motion in the alternative of the appellant to correct diminution of record.

3. That on November 24, 1943 and November 26, 1943, proceedings were had in the District Court of the United States for the District of New Jersey upon a hear-

ing before a statutory court consisting of the Honorable Gerald McLaughlin, Circuit Judge, and the Honorable Guy L. Fake and the Honorable Thomas F. Meaney, District Judges, on the application of the appellees for an interlocutory injunction against two orders of the Interstate Commerce Commission, of June 8, 1943 and November 2, 1943, respectively, insofar as they authorized appellant to publish and charge certain increased fares for interstate transportation of passengers.

4. That the stenographic report of the proceedings upon such hearings was taken and transcribed by the official reporter of said District Court, Theresa Cross Bergen. Attached to this affidavit, marked "Exhibit A", is the transcript of such stenographic report as originally furnished by such official reporter to the affiant as counsel for appellant.

On subsequent inquiry by affiant of the official reporter affiant was advised that there had been omitted from page 177 of such transcript the following:

> "Judge McLaughlin: Off hand, we seriously question the right of a New Jersey municipality to furnish such bond".

and that this omitted matter immediately followed the statement of Judge McLaughlin shown on page 177, reading as follows:

> "Judge McLaughlin: We will add to the opinion with reference to the necessity of the municipal plaintiff being required to give bond, as we see it, there is no obligation on the part of such branch of Government to furnish a bond in this proceeding."

On further request to the official reporter, affiant was furnished with an additional transcript of the official stenographic report of such proceedings, such additional transcript being entitled by such official reporter

"EXCERPT FROM INFORMAL COLLOQUY RE FIXING OF DATE FOR FINAL HEARING"

Such additional transcript is attached to this affidavit marked "Exhibit B." The official reporter advised affiant that the matter covered by this additional transcript had been omitted from Exhibit A at the direction of Judge McLaughlin.

5. On February 9, 1944, all parties to this appeal from the granting of an interlocutory injunction, as well as all parties to the related appeal, No. 767, from a decree and order granting a permanent injunction, entered into a stipulation for a praecipe for a consolidated transcript of record covering both appeals. In such stipulated praecipe, there was designated for transmission to this Court as part of the record on this appeal said transcript of the stenographic report of the proceedings on the hearings of November 24 and November 26, 1943 before said statutory court.

6. On or about February 24, 1943, affiant, while engaged in cooperating with the Clerk of said District Court in the preparation of such consolidated transcript of record for transmission on such appeals to this Court, learned, for the first time, that no part of said transcript of the stenographic report of the proceedings on said hearings of November 24 and November 26, 1943 upon the application for an interlocutory injunction had been filed of record in said District Court, although there had been filed of record

in said Court a transcript of the stenographic report of the proceedings on the hearing of December 14, 1943 on the application for a permanent injunction. Said latter transcript now forms part of the consolidated transcript of record certified by said District Court to this Court.

7. Thereupon affiant requested Judge McLaughlin, as the Circuit Judge who had presided at said hearings of November 24 and 26, 1943, on the application for an interlocutory injunction, and Judge Meaney, who had convened said statutory court to hear such application, to permit at least that portion of the transcript of the proceedings on said hearings covered by Exhibit A to be filed of record in said Court and to be certified to this Court as part of the consolidated transcript of record on the aforesaid appeals. Both Judge McLaughlin and Judge Meaney refused such permission, stating in substance that they considered the transcript of such proceedings upon the application for an interlocutory injunction irrelevant to this appeal from the order granting said injunction. In view of the attitude of the majority of the Court, affiant made no request in the foregoing respects to the remaining member of the Court, Judge Fake.

8. Affiant believes that such transcript of the stenographic report of the proceedings on the hearings of November 24 and November 26, 1943 before such statutory court on the application by appellees for an interlocutory injunction is a relevant, necessary, and proper part of the record upon this appeal from the order granting such interlocutory injunction, for the following reasons:

A. Three of the basic findings of said statutory court, which appellant has assigned as error upon this appeal,

are either expressly, or by necessary implication, based on matters which appear only in such transcript of the stenographic report of the proceedings before said Court and do not appear in the present transcript of record on this appeal.

Finding No. 5, that appellees were denied a full and fair hearing before the Interstate Commerce Commission is, by its express terms, based on "pleadings and *arguments herein*" (i.e. in such proceedings before said Court).

Finding No. 6 that

> "The national interest requires that the fares of said (appellant) railroad be maintained as currently in effect, which present fares are the same as those in effect on September 15, 1942, pending final hearing of this cause"

was made in the absence of any evidence whatever to such effect appearing in the present transcript of record on appeal before this court and must be based, if at all, upon certain representations and arguments to such effect made by counsel for appellees in the proceedings on the hearings before said Court on the application for such interlocutory injunction, and which appear only in such transcript of the stenographic report of such proceedings.

Finding No. 7, insofar as it finds that irreparable damage will result pending final hearing to the appellee, Director of Economic Stabilization, if an interlocutory injunction should not be granted against said orders of the Interstate Commerce Commission, was likewise made in the absence of any evidence whatever to such effect appearing in the present transcript of record on appeal before this Court, and must likewise be based, if at all, upon certain arguments and representations to this effect made by counsel

for said appellee in the proceedings on the hearings before said Court on the application for an interlocutory injunction, and which appear only in such transcript of the stenographic report of such proceedings.

Affiant believes that such transcript of said stenographic report will demonstrate that such statutory court was unjustified in making such findings, on any basis therein appearing.

B. Said transcript will show that said statutory court not only abused its discretion in issuing such interlocutory injunction but that it acted under a complete misapprehension of the proper function of such an injunction, of the proper limits of its discretion in relation thereto, and of the evidence necessary to sustain an order granting such an interlocutory injunction as distinguished from a permanent injunction.

C. Said transcript will show that said statutory court on the hearing of the application for an interlocutory injunction proceeded on the theory that it was called upon to determine to the same extent as upon final hearing whether, as alleged in the complaint and the intervening petition of the respective appellees, the Commission's orders sought to be enjoined were made without full and fair hearing and contravened the Emergency Price Control Act and the Inflation Control Act; that, accordingly, said Court, instead of merely undertaking to determine whether such complaint and intervening petition made a prima facie showing in these respects, so as not on their face to require dismissal of such application, undertook in its findings Nos. 5 and 6 heretofore referred to to make findings in these re-

spects as if upon final hearing; that said Court ignored the fact that the real issues before it upon the application for an interlocutory injunction were whether if such orders were not enjoined pending final hearing irreparable damage would result to appellees or whether, if they were enjoined, no damage would result to appellees but irreparable damage would result to appellant; that thereupon the Court, in the absence of any evidence whatever that irreparable damage would result to the appellees pending final hearing, and based either upon mere representations and arguments of counsel for appellees that such irreparable damage would result, or on the assumption that such damage followed as a matter of law from its findings Nos. 5 and 6, made its finding No. 7 that irreparable damage would result to appellees if an interlocutory injunction were not granted; (in this connection, the attention of this Court is respectfully called to the affidavit of Arthur Potterton, Acting Mayor of appellee, City of Jersey City, presented on such application and which is part of the present transcript of record on this appeal, which affidavit, however, fails to show that any damage could result to the said appellee pending final hearing by the denial of an interlocutory injunction, as distinguished from damage which might result by the granting of a final injunction); that said Court, therefore, erroneously failed to find that irreparable damage would result to appellant from the granting of an interlocutory injunction, although conclusive proof that such irreparable damage would result was contained in the affidavit of Walter F. Brown, Chairman of the Board of Directors and President of the appellant railroad, which is part of the present transcript of record on this appeal.

D. Said transcript will show that said statutory court, at the hearing of November 24, 1943, on the application for an interlocutory injunction, offered to set said proceedings for final hearing the following week if appellant would comply with the Court's suggestion that appellant voluntarily postpone the effective date of its tariff publishing the increased fares authorized by the Commission's order; that, when appellant refused such voluntary postponement, the Court, in granting an interlocutory injunction, undertook to postpone the final hearing until January 4, 1944, and only consented to advance the final hearing to December 14, 1943 when appellant suggested it would ask the convening of another statutory court in order to obtain an earlier final hearing so as to minimize damage to appellant.

E. Said transcript of record will show that, although appellant specifically directed the Court's attention to Rule 65(c) of the Federal Rules of Civil Procedure, providing that no preliminary injunction shall issue except upon the giving of security by applicant in such sum as the court deems proper for the payment of such costs and damages as may be incurred and suffered by any party who is found to have been wrongfully enjoined or restrained, and that only the United States or an officer or agent thereof are exempted from such requirement, the Court, although stating

> "Off hand, we seriously question the right of a New Jersey municipality to furnish such bond"

nevertheless granted an interlocutory injunction, and held the appellee, City of Jersey City, exempted from the requirements of Rule 65(c).

F. Without such transcript, appellant will be unable to show the full extent to which such statutory court abused its discretion in the foregoing and other respects in the issuance of such interlocutory injunction.

9. Affiant believes it proper in connection with this motion to call the Court's attention to the fact that appellee, City of Jersey City, has filed no objection to the jurisdiction of this Court of this appeal, and that the objection filed in this respect by appellee, Director of Economic Stabilization, makes no claim that this appeal has become moot by reason of the subsequent granting of a final injunction in the same proceedings. Affiant nevertheless believes it appropriate in connection with this motion respectfully to call the Court's attention to the following grounds upon which the affiant believes it demonstrated that this appeal has not become moot.

A. Affiant respectfully submits that, should it be determined that such interlocutory injunction was wrongfully granted, appellant should be entitled to damages against appellee, City of Jersey City, by reason of such appellee's reckless, if not malicious, prosecution before said statutory court of its application for such interlocutory injunction under the following circumstances:

(1) Such appellee's knowledge that it could not be damaged pending final hearing, should no interlocutory injunction be granted.

(2) Such appellee's knowledge that appellant would be irreparably damaged in excess of $1,000 per day by the granting of such interlocutory injunction pending final hearing.

(3) Such appellee's knowledge that it was without power to give the security required by Rule 65(c) of the Federal Rules of Civil Procedure to protect appellant from damages which would follow the wrongful granting of such interlocutory injunction, and such appellee's knowledge of the expression by the statutory court of its serious question of such appellee's power to give such security.

(4) Such appellee's knowledge that, unless it had power to give the security required by Rule 65(c), it was not entitled to an interlocutory injunction.

B. Affiant respectfully submits that, irrespective of appellant's right to damages against appellee, City of Jersey City, this Court should determine whether such interlocutory injunction was wrongfully granted for the following reasons:

(1) To determine the important question whether it is an abuse of discretion by a statutory court to grant an interlocutory injunction in the absence of evidence of substantial or irreparable damage to the applicant, if such injunction be denied, and in the face of evidence of irreparable damage to a defendant should such injunction be granted.

(2) To determine the important question whether a municipal applicant for an interlocutory injunction is exempt from Rule 65(c) of the Federal Rules of Civil Procedure.

Affiant respectfully submits that the failure of this Court to determine these questions might well be construed

by other statutory courts as an approval, if not a specific affirmance, of the action of the statutory court here involved with respect to such questions.

JOHN F. FINERTY.

Subscribed and sworn to before me
March 20, 1943.

.....
Notary Public

In the District Court of the United States for the District of New Jersey

CIVIL ACTION No. 3073

CITY OF JERSEY CITY, PLAINTIFF, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, INTERVENOR, PLAINTIFF

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, DEFENDANTS

OBJECTIONS OF INTERVENOR FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, TO APPEAL OF DEFENDANT HUDSON & MANHATTAN RAILROAD COMPANY, FROM ORDER GRANTING INTERLOCUTORY INJUNCTION, AND MOTION TO DISMISS SAID APPEAL

Pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, the Intervenor Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, sets forth the following matters or grounds making against the jurisdiction of the Supreme Court as asserted by the defendant Hudson & Manhattan Railroad Company in its appeal from the order of the Court granting an interloctuory injunction herein.

The defendant's assignments of error may be summarized as follows:

1. That neither the plaintiff nor the intervenor has such interest in the subject matter as would sustain an application for interlocutory injunction.
2. That no irreparable damage will result to the plaintiff or the intervenor.
3. That irreparable damage will result to the defendant.
4. That neither plaintiff nor intervenor was required to give bond to protect the defendant as required by law and Rule 65 (c) of the Federal Rules of Civil Procedure.
5. That the Court's findings are for the most part irrelevant, and are wholly unsupported by any evidence before the Court.

Said contentions were argued at length before the 3-judge court, which had before it the entire record made before the Interstate Commerce Commission. It is submitted that none of said contentions is sound. Insofar as applicable to your intervenor, the record shows:

1. *Intervenor's interest.*—Your intervenor's interest is derived from the Emergency Price Control Act of 1942 as amended October 2, 1942 (56 Stat. 765) and orders thereunder. Under that statute it is the policy of government that prices, wages and salaries shall be stabilized during the war emergency at the level prevailing on September 15, 1942, with adjustments only as required to

fulfill wartime obligations or to correct gross inequities. Your intervenor is the agency designated to intervene before federal and state public utility commissions in order that the stabilization policy of the government shall receive due recognition and enforcement in the fixing of public utility rates and charges.

It is your intervenor's position that the Interstate Commerce Commission was under a legal duty to recognize and enforce in this proceeding the national policy and program of price stabilization and to deny any rate increase over and above the rates, fares and charges in effect on September 15, 1942, unless it clearly appeared that such increase was necessary after giving full and complete consideration to the improvement in the company's operations, revenues and income as a result of the war and the restrictions imposed on competitive forms of transportation; and that, in disregard thereof, said Commission failed and refused to give to your intervenor (although a party to the proceeding) a full and fair hearing, and granted a general rate increase, increasing the cost of living in direct violation of said legislation.

It seems to be defendant's contention that, even if the foregoing were true, your intervenor has no such interest in the subject matter as would entitle him to complain in a civil action. Such contention, it is submitted, is unsound.

2. *Irreparable damage to intervenor.* Section 1 (a) of the Emergency Price Control Act of

January 30, 1942 (P. L. 421, 77th Cong., 2nd Sess.) provides in part as follows:

> It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values. . . .

It seems obvious that a violation of the stabilization program threatens irreparable damage to the highest interests of government and to the welfare of all our people; and it is immaterial that the full extent of the damage which would result from

the violation of such legislation in this or any other case is not immediately measurable in dollars and cents.

3. *Irreparable damage to defendant.*—Defendant contends that the interlocutory injunction will result in irreparable damage to it. Such cannot be true if the challenged rate orders are improper.

The 8-cent downtown fare which the defendant is required to charge under the interlocutory injunction is the same fare which the defendant has had in effect since July 25, 1938; it is the same fare which the Supreme Court of the United States approved in 1941 as the highest fare which the defendant might properly charge under then-existing competitive conditions. Defendant seeks now to exact a 10-cent fare despite the fact that the record either shows or the plaintiff and the intervenor offered to prove that its traffic has enjoyed a phenomenal increase due to wartime conditions, that its corporate income at the present time exceeds the amount which it represented as necessary at the time it initiated this rate proceeding in June 1942, that the downtown line (as to which it seeks a fare increase) has always been and now is the most profitable of several distinct utility operations conducted by the defendant, that such downtown line independently considered is already earning a full and adequate return, and defendant's other utility operations have not been made to yield their fair share of the corporate income. In justification of its demand for increase in the downtown fare the defendant states

that its normal competitive ceiling of 8 cents is not operative during the war period, due to restrictions on automobiles, tires, rubber and gasoline and due to the accelerated demand for transportation. The express purpose of the Price Control or Stabilization Acts is to prevent price increases under such circumstances.

It seems obvious that the defendant, whose traffic has been growing from month to month, will suffer no irreparable damage due to the preservation by the court of the *status quo* pending final determination on the merits and that its private or profit interest is inferior to the national interest arising from the stabilization legislation enacted by Congress to aid in the winning of the war.

4. *Bond to protect defendant.*—Defendant does not insist that your intervenor is required to give bond as a condition precedent to the issuance of an interlocutory injunction. Your intervenor and other agencies of the Goverment are exempt from such requirement. (28 U. S. C. sec. 870; Federal Rules of Civil Procedure, Rule 65).

Since the interlocutory injunction was properly issuable at the request of your intervenor, it would seem to be immaterial that no bond was required of the plaintiff Jersey City—entirely apart from the fact that the Court decided that the plaintiff was not entitled to such exemption in its own right.

5. *Findings relevant and substantiated.*—The findings of the three-judge court are clear, orderly,

specific and relevant. The record was before the court, briefs were submitted, and the facts and issues were argued at great length.

The Court found that—

> The plaintiff and intervenor are proper parties to maintain this proceeding.—Findings (1) and (4).
>
> The Commission was under a legal duty to afford to plaintiff and intervenor, who were proper parties in the proceeding before the Commission, a full and fair hearing; and the Commission did not do so—having denied to said parties the opportunity to present evidence and testimony, including the right to cross-examine witnesses on material matters of a probative nature relevant to the issues.—Findings (2), (3), (4), (5).
>
> The national interest requires that the defendant's fares be maintained as currently in effect pending final hearing, and irreparable injury would result to plaintiff and intervenor in the absence of an interlocutory injunction.—Findings (6) and (7).

Findings (6), which relates to the effect of an increase in fares on the stabilization program, is not only sustained by the evidence, but also conforms to decisions of the Emergency Court of Appeals on the effects of price increases on inflation. See *Lincoln Savings Bank* v. *Brown,* decided May 5, 1943, OPA Service p. 610:17, *Philadelphia Coke Co.* v. *Bowles,* decided December 15, 1943, OPA Service p. 610:92, and *U. S. Gypsum Co.* v. *Brown* 137 F. (2d) 360.

All of the aforesaid findings are amply sustained by the record before the court. Both the Amended Complaint of the plaintiff City of Jersey City and your intervenor's Petition of Leave to Intervene contain explicit references to and excerpts from the Commission record, setting forth in detail the facts and matters at issue.

The matter falls within the well-established rule that an order of a three-judge court denying or granting an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion.

United Fuel Gas Co. v. *Public Service Commission*, 278 U. S. 322;
Alabama v. *United States*, 279 U. S. 229;
National Fire Insurance Co. v. *Thompson*, 281 U. S. 331.

Wherefore, your intervenor moves:

1. That the appeal be dimissed.

2. That the order granting the interlocutory injunction be affirmed.

Respectfully submitted.

FRED M. VINSON,
Economic Stabilization Director,
By CHESTER BOWLES,
Price Administrator,
By RICHARD H. FIELD,
Acting General Counsel,
DAVID F. CAVERS,
Assistant General Counsel,
HARRY R. BOOTH,
Utilities Counsel,
Office of Price Administration Legal Department.

U. S. GOVERNMENT PRINTING OFFICE: 1944

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANT

v.

CITY OF JERSEY CITY, AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

MEMORANDUM FOR THE ECONOMIC STABILIZATION DIRECTOR IN RESPONSE TO MOTION OF APPELLANT TO CORRECT DIMINUTION OF RECORD

The motion submitted by appellant relates to its appeal from the order of the court below granting a preliminary injunction. A separate appeal (No. 767) has been taken by appellant and the Interstate Commerce Commission from the order entering a final injuncton.

In view of the final injunction and the appeal therefrom, it is submitted that questions relating to the granting of the temporary injunction are no longer in issue, and that the appeal in No. 766 should be dismissed. *Smith* v. *Illinois Bell Telephone Company*, 270 U. S. 587.

Appellant seeks to raise the question whether the court below erred in not exacting a bond from appellee City of Jersey City as a condition of granting the preliminary injunction. The injunction was sought also, however, by the Economic Stabilization Director, to protect the public interest against an increase in rates ordered without a proper hearing in the light of the Inflation Control Act of October 2, 1942. The court's findings on issuing the preliminary injunction, particularly Findings 5 and 6, disclose that the injunction was granted because "the national interest requires that the fares of the said railroad be maintained as currently in effect, which present fares are the same as those in effect on September 15, 1942, pending final hearing of this cause." (Finding 6.) The Director was clearly exempted by Rule 65 (c) of the Federal Rules of Civil Procedure from any obligation to give security. That Rule provides: "No such security shall be required of the United States or of an officer or agency thereof." It thus appears that the question sought to be raised by appellant with respect to a bond is academic. There is no occasion to consider appellant's position had there been an attempt to enforce the preliminary injunction by the City of Jersey City. The same answer applies to the suggestion of appellant that, apart from a bond, it is entitled to damages against the City by reason of what is unaccountably described as the latter's

"reckless, if not malicious, prosecution" of its application for preliminary injunction. (Motion, p. 11.)

Although for the reasons stated herein and in our motion to dismiss the present appeal, we believe that the controversy is limited to the issuance of the final injunction, we raise no objection to the inclusion in the record of the portions of the transcript which are the subject of appellant's motion.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

MARCH 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 25 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

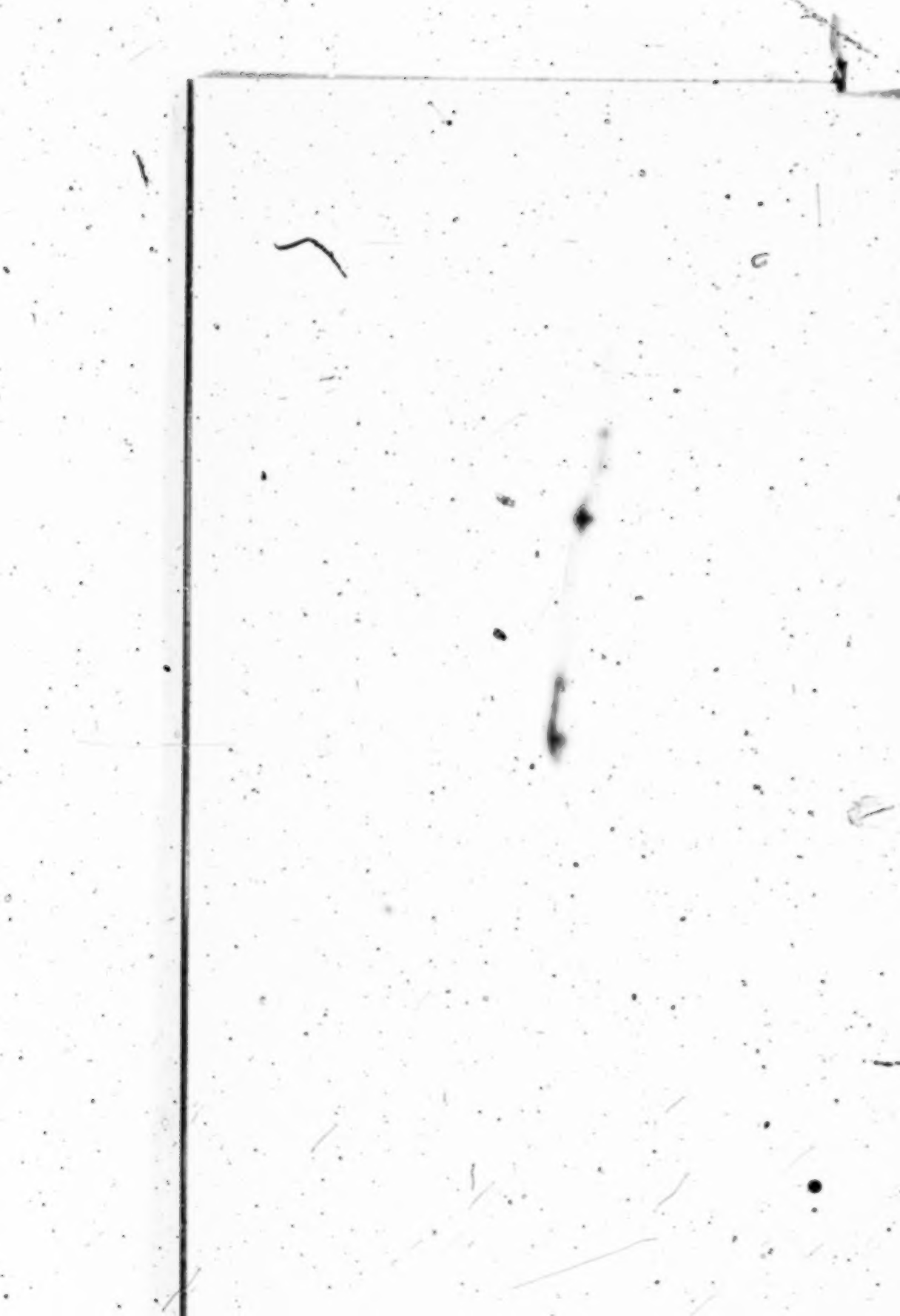
CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

On Appeal from the District Court of the United States for the District of New Jersey

MEMORANDUM IN OPPOSITION TO MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.
City Hall,
Jersey City, N. J.

CHARLES HERSHENSTEIN,
Of Counsel.



SUBJECT MATTER INDEX.

MEMORANDUM IN OPPOSITION TO MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD 1

POINT I. The proceedings of November 24th, 1943 and November 26th, 1943, do not form a part of the record or proceedings below properly includable in the record of appeal 2

POINT II. The proceedings included within the transcript in question were all preliminary to the granting of an interlocutory injunction, the issuance of which has become moot because of the later granting of a final injunction 4

POINT III. The several alleged grounds of necessity for reference to the transcript are frivolous and insufficient 6

CONCLUSION 7

TABLE OF CASES.

Black & Yates, Inc. v. Mahogany Association, 129 F. 2d 227, 237 (C.C.A. 3rd, 1941) 3

Middleton v. Hartford Accident & Indemnity Company, 119 F. 2d 721, 724 (C.C.A. 5th, 1941) 3

Royal Petroleum Corporation v. Smith, 127 F. 2d 841, 843 (C.C.A. 2d, 1942) 3

Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 588 5

STATUTES, RULES AND AUTHORITIES.

4 C. J. S., 1207 3

U. S. Supreme Court Rules

Rule 10, para. 2 2

Rule 75(e) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

On Appeal from the District Court of the United States for the District of New Jersey

MEMORANDUM IN OPPOSITION TO MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

Appellee, City of Jersey City, respectfully maintains that the motion of the appellant should not be granted for the reasons that:

1. The subject matter of the transcript in question is in no sense a part of the record or proceedings below, properly subject to inclusion in the record of appeal.

2. The transcript comprises the argument before the district court on the application for an interlocutory injunction, which application and the resulting interlocutory injunction have become moot by virtue of the issuance of a final injunction and the filing of the present appeal therefrom by appellant.

3. The several alleged grounds of necessity for reference to the transcript in the argument of appellant's appeal are frivolous and insufficient to warrant inclusion of the transcript in the present record.

POINT I.

The proceedings of November 24th, 1943 and November 26th, 1943, do not form a part of the record or proceedings below properly includable in the record of appeal.

Inspection of the transcript, which has been annexed to appellant's motion papers as "Exhibit A," will demonstrate that it consists entirely of legal argument by counsel, colloquy between court and counsel, between members of the court, and among counsel. Not a single witness was sworn and all of the evidence adduced in the proceedings is contained in the record of appeal and is fully intelligible without reference to the transcript here in question.

Rule 10, paragraph 2, of the Rules of the Supreme Court provides that:

> "... Sections (c), (e) and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure are incorporated herein by reference and are made applicable to an appeal to this court from a Federal District Court".

Rule 75(e) provides as follows:

> "(e) *Record To Be Abbreviated.* All matter not essential to the decision of the questions presented by the appeal shall be omitted ..."

It is fundamental that colloquies between a trial judge and counsel, or between counsel, are no proper part of the

record on appeal. 4 C. J. S. 1207. Addresses or arguments of counsel are not a proper constituent of the record. *Id.*

Several decisions of the Circuit Courts of Appeal, construing Rule 75, confirm the impropriety of the inclusion in an appeal record of arguments of counsel or colloquies.

In *Middleton* v. *Hartford Accident & Indemnity Company*, 119 F. 2d 721 (C. C. A. 5th 1941), the court, referring to the proper contents of the "record and proceedings" on appeal, under Rule 75 of the Federal Rules of Civil Procedure, said, at page 724:

> "If there is a reporter's transcript it may be required to be used by either party, in whole or in part, subject to correction by the judge. But this does not mean that always the entire transcript is or can be required to be used. Much of it often consists of preliminary statements, arguments of counsel, repetitions, irrelevancies, which counsel and the trial judge know are immaterial and could easily strike out; but the materiality of them can be discovered in the appellate court only by reading and considering it all after the expense of transcribing and printing has been incurred. That only the parts of the transcript essential to the questions to be decided are to be used is apparent from Rule 75(b) and (e)."

The arguments of counsel, constituting a major portion of the transcript sought to be included in the record by the present motion, are of no different nature than a filed brief. Briefs are certainly no part of the record. *Black & Yates, Inc.* v. *Mahogany Association*, 129 F. 2d 227, 237 (C. C. A. 3rd 1941).

In *Royal Petroleum Corporation* v. *Smith*, 127 F 2d 841 (C. C. A. 2d 1942), the court said, at page 843:

> "We wish further to call attention to the inclusion in the present record of the colloquy of court and coun-

sel. Rule 75(e), explicitly forbids 'all matter not essential to the decision'; and indeed before the Rules went into effect we had repeatedly declared against the practice (citing cases). None of the colloquy which was printed can be thought to have been in the remotest way 'essential to the decision'. If in the rambling discussions anything 'essential' had appeared, it should have been selected and put in such form as to be comprehensible. We cannot undertake to grope our way through a heap of rubbish on the odd chance of picking up a bit of sound metal here and there."

It is thus perfectly plain that since the transcript here in question contains no evidence whatsoever, but merely argument of counsel and colloquy, it has no proper place in the record and the pending motion should therefore be denied on that ground alone, if for none of the others hereinafter set forth.

POINT II.

The proceedings included within the transcript in question were all preliminary to the granting of an interlocutory injunction, the issuance of which has become moot because of the later granting of a final injunction.

The proceedings of November 24th, 1943 and November 26th, 1943, the subject matter of the transcript in question, constituted solely the argument and colloquy on the application for interlocutory injunction. Such injunction was granted November 26th, 1943. Final hearing was held December 14th, 1943, resulting in the issuance of a final injunction. Although appeal has been taken to this court from the granting of both the interlocutory and final injunctions.

it is plain that because of the appeal from the final injunction, the propriety of the issuance of the interlocutory injunction is moot. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588. No action which this court may take upon appeal can directly affect the position of the appellant for the period of time which elapsed during the pendency of the interlocutory injunction. This court can be concerned only with the question of the continuance in effect or the abrogation of the existing final injunction, which has naturally superseded the operative effect of the interlocutory injunction.

Appellant indicates one of its real motives for the present motion in its showing, in the present motion papers, of the belief which it entertains that it will be able, some time in the future, to maintain an action for damages against the appellee, City of Jersey City, by reason of appellee's "reckless, if not malicious," prosecution of its application for the interlocutory injunction. We submit that this Court will not lend its dignity toward aiding and abetting the prosecution, in some collateral proceeding, of a claim for damages by one of the parties to the instant appeal against another, through the instrumentality of inclusion in this record of subject matter otherwise improper.

POINT III.

The several alleged grounds of necessity for reference to the transcript are frivolous and insufficient.

Appellant contends that the inclusion of the transcript in the record is necessary in order to show that the court below violated Rule 65(c) of the Rules of Civil Procedure, dealing with bonds on granting of preliminary injunction, by not requiring the appellant, City of Jersey City, to furnish a bond. This contention is without substance for the following reasons:

1. The failure to require a bond has become academic and moot since the bond requirement only applies to an application for a preliminary injunction and the preliminary injunction has now been superseded by a final injunction. See Point II, *supra.*

2. In any event, the appellee, the Economic Stabilization Director, also being a party plaintiff and praying for the issuance of the injunction, it made no difference that a co-plaintiff was applying for such relief, Rule 65(c) being specifically inapplicable to "the United States or * * * an officer or agency thereof."

Appellant also contends that the transcript in question should be included in the record for the reason that some of the findings made by the court are stated to be based in part on "pleadings and arguments" herein. Appellant pretends to have the right to demonstrate on this appeal that the "arguments" made before the court below do not substantiate its action or its findings. If the strict record, including the evdence, does not legally justify the action of the court below, appellant will prevail. Appellant does

not carry the affirmative burden of demonstrating that none of the arguments made in support of the action taken by the court below were legally sufficient.

Appellant also relies upon the fact that it can show from remarks made from the bench by members of the court that the court entertained an improper and erroneous conception of its proper scope of action in the matter of an application for a preliminary injunction. Obviously comments made by judges in the course of the hearing are in no sense binding upon the court or indicative of anything save their curbstone impressions. Appellant is not at liberty to impute any theories, views or attitudes to the trial judges other than those for which they make themselves expressly responsible when they issue their opinion, findings of fact and judgment or decree.

Conclusion

It is respectfully submitted that none of the pretended bases for the inclusion of the transcript in question in the record are sound or justifiable.

For any or all of the reasons stated it is respectfully submitted that the motion should be denied.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.

CHARLES HERSHENSTEIN,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 9 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

Answer of Appellee, City of Jersey City, to the Petition of the Appellant, Hudson & Manhattan Railroad Company, for Rehearing of Motion to Dismiss Appeal from Interlocutory Injunction and of Order Dismissing Its Appeal.

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.
City Hall,
Jersey City, N. J.

CHARLES HERSHENSTEIN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

Answer of Appellee, City of Jersey City, to the Petition of the Appellant, Hudson & Manhattan Railroad Company, for Rehearing of Motion to Dismiss Appeal from Interlocutory Injunction and of Order Dismissing Its Appeal.

The appellee, City of Jersey City, in answer to the petition of appellant, Hudson & Manhattan Railroad Company, for rehearing of the motion to dismiss its appeal from the interlocutory injunction heretofore granted and of the order of this Court dated April 3, 1944, granting said motion, respectfully shows as follows:

1. The *Per Curiam* opinion dismissing the appeal herein upon the authority of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9; *Sterling* v. *Constantin*, 287 U. S. 378, 386, is applicable to the facts in the case at bar.

2. The fact that appellant appealed, as a matter of right, from the granting of the interlocutory injunction and

appealed subsequently, as a matter of right, from the granting of a final injunction does not alter the fact that the interlocutory injunction became merged in the final injunction.

3. The holding of this Court upon the authority of *Smith* v. *Illinois Bell Telephone Co.* and *Sterling* v. *Constantin, supra,* is based upon the reasoning that the *subject matter* of the appeal from the interlocutory injunction became moot as soon as the interlocutory injunction became final and not, as contended by the appellant, upon the theory that when the appeal was taken from the final injunction appellant's *right to appeal* from the interlocutory injunction was extinguished. The remedy of appeal, as a matter of right, from an interlocutory injunction is effective in those cases where the statutory court has not yet rendered its decision upon final hearing, or where no appeal from a final decree has yet been taken.

4. The provisions of Rule 65 C of the Federal rules of procedure have no application to the question as to when the subject matter of an appeal from an interlocutory injunction becomes moot. In any event, the provisions of Rule 65 C of the Federal rules of procedure are not applicable to the case at bar by reason of the fact that said rule provides "no such security shall be required of the United States or of an officer or agency thereof." Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, was a plaintiff, by intervention, in this cause. The interlocutory injunction issued in his favor did not require the furnishing of a bond. The injunction, once issued, enures to the benefit of all plaintiffs, whether or not another plaintiff filed a bond. Rule 65 C does not, *ipso facto,* give appellant the right to sue for damages, because Rule 65 C is merely

a security clause and by itself does not give a party an absolute right to a recovery of damages. Furthermore, as we have heretofore stated, since an agent or officer of the United States Government is a party to these proceedings no security was required in this case.

5. To appellant's contention that in any event it is entitled to a determination by this Court as to whether the interlocutory injunction was wrongfully issued as a basis for a damage suit, we submit that no action which this Court may take upon the appeal from the interlocutory injunction can directly affect the position of the appellant for the period of time which elapsed during the pendency of the interlocutory injunction. This Court could be concerned only with the question of the continuance in effect or the abrogation of the then existing final injunction which naturally superseded the operative effect of the interlocutory injunction.

6. Appellant in its petition, paragraph VI, sets out further reasons why this Court should entertain the application for a rehearing of the motion to dismiss.

Answer has already been made to sub-division (a).

As to sub-division (b), it has never been contended by appellee, City of Jersey City, that a municipality is exempt from the provisions of Rule 65 C, but as already stated, since an officer or agent of the United States Government was a party to these proceedings the lower court dispensed with the filing of a bond.

Replying to sub-division (c), the interlocutory injunction was granted both to the intervening plaintiff, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, and the City of Jersey City. No question has arisen in the court below or at any stage

in these proceedings that the City of Jersey City lacked authority to give security required by Rule 65 C.

As to sub-division (d), nowhere in the proceedings in the court below nor in the opinion rendered by this Court does it appear that the lower court abused its discretion in granting the interlocutory injunction. In the opinion rendered by this Court upon the appeal from the final injunction no mention is made of any irreparable damage suffered by the appellant.

It is further argued by appellant that the motion to dismiss the appeal was not made by the appellee, City of Jersey City, upon the cited cases of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9; *Sterling* v. *Constantin*, 287 U. S. 378, 386. This statement is inaccurate. The Court's attention is respectfully directed to the memorandum of the City of Jersey City submitted in opposition to the motion in the alternative by appellant to correct diminution of record, Point II, page 5, wherein this appellee specifically contended that the question of the issuance of the interlocutory injunction was moot upon the authority of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9.

7. Appellant again urges that it should be entitled, as of right, to an appeal from the interlocutory injunction and to a determination by this Court whether such interlocutory injunction had "*wrongfully*" issued, since such determination is an indispensable condition precedent to the right to recover damages either under Rule 65 C or in a suit for malicious prosecution. The appellant is therefore seeking a determination of a moot question in order to predicate thereon a course of action for damages. It is significant that in determining that the final injunction should be set aside this Court did not find that such injunction was "*wrongfully*" issued in the sense in which that word is used by the appellant, namely, a basis for a suit for damages.

The real motive of appellant in making this application is apparent. It seeks a determination from the highest court in the land upon a question entirely moot to aid it in prosecuting a claim for damages against the municipality who dared to use honestly and courageously all legal means available to it to prevent an increase of fares on behalf of the people it represents. We urge and respectfully submit that the railroad company is not justified in asking this Court to lend its dignity towards aiding the railroad company in the prosecution of a suit for damages.

The matter of increased fares for the Hudson & Manhattan Railroad Company has been the subject of investigation by the Interstate Commerce Commission for years. It was the duty of the officials of Jersey City, as well as of the Director of Economic Stabilization, to take whatever legal steps were available to them to see that a reasonable fare was charged in using the facilities of the appellant. To permit appellant to exact increases, as it has steadily attempted to do, without a contest, would have rendered the officials of the city derelict in their duty. The City of Jersey City was successful in all of the previous litigation, except in the present instance. Can it be seriously contended by this appellant that the granting of the interlocutory injunction was either wrongful or malicious?

We respectfully submit that the petition of the appellant, Hudson & Manhattan Railroad Company, for the rehearing of the motion to dismiss and of the order dismissing this appeal be denied.

Charles A. Rooney,
Attorney for Appellee,
City of Jersey City.

Charles Hershenstein,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 29 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

MOTION BY APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF APRIL 3, 1944, DISMISSING THE APPEAL HEREIN

JOHN F. FINERTY
JOHN E. BUCK
THOMAS A. HALLERAN
Counsel for appellant Hudson & Manhattan Railroad Company

Supreme Court of the United States

OCTOBER TERM 1943

HUDSON & MANHATTAN RAILROAD COMPANY, *Appellant*, *vs.* CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellees*.	No. 766

MOTION BY APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY FOR LEAVE TO FILE A PETITION FOR REHEARING OF THIS COURT'S ORDER OF APRIL 3, 1944, DISMISSING THE APPEAL HEREIN

To the Honorable the Supreme Court of the United States:

Hudson & Manhattan Railroad Company, appellant in the above proceeding, respectfully moves this Court for an order granting said appellant leave to file, within fifteen (15) days after the entry of such order, a petition for rehearing of the order of this Court of April 3, 1944, granting the motion dismissing the above appeal.

The grounds upon which such motion is made are as follows:

The above appeal was an appeal by appellant Hudson & Manhattan Railroad Company from an order of the District Court of the United States for the District of New Jersey granting an interlocutory injunction against two

orders of the Interstate Commerce Commission which permitted appellant, on certain conditions, to increase its local interstate fare on its downtown line. This Court dismissed said appeal on April 3, 1944, apparently on the ground that said appeal had become merged with the appeal in No. 767, which was a joint appeal by the Interstate Commerce Commission and Hudson & Manhattan Railroad Company from the final order and decree of said District Court perpetually enjoining such two orders of the Interstate Commerce Commission. Until this Court had decided the appeal in No. 767, appellant could not determine whether it would be proper to file a petition for rehearing of the order dismissing the appeal herein, since such petition would only be warranted should this Court reverse the order of the District Court granting a permanent injunction. On May 29, 1944, this Court in No. 767 reversed the order of the District Court granting such permanent injunction. Appellant now desires to file a petition for rehearing of the order of this Court granting the motion dismissing the appeal herein, but will be unable to do so within the time specified by Rule 33 of the Revised Rules of this Court unless this Court shall grant it leave to file such a petition.

WHEREFORE, appellant respectfully prays that the foregoing motion be granted.

Respectfully submitted,

JOHN F. FINERTY
JOHN E. BUCK
THOMAS A. HALLERAN
Counsel for appellant Hudson & Manhattan Railroad Company

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 5 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

PETITION OF APPELLANT, HUDSON & MANHATTAN RAILROAD COMPANY, FOR REHEARING OF MOTION TO DISMISS, AND OF ORDER DISMISSING ITS APPEAL

JOHN F. FINERTY
JOHN E. BUCK
THOMAS A. HALLERAN
Counsel for Appellant Hudson & Manhattan Railroad Company

Supreme Court of the United States

HUDSON & MANHATTAN RAILROAD COMPANY, *Appellant*, *vs.* CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellees.*	October Term, 1943 No. 766

PETITION OF APPELLANT, HUDSON & MANHATTAN RAILROAD COMPANY, FOR REHEARING OF MOTION TO DISMISS, AND OF ORDER DISMISSING ITS APPEAL

Hudson & Manhattan Railroad Company, appellant in the above proceedings, respectfully petitions for rehearing of the motion to dismiss its appeal herein, and of the order of this Court of April 3, 1944 granting said motion and dismissing such appeal. The grounds of this petition are as follows:

I. Neither *Smith* v. *Illinois Bell Telephone Company*, 270 U. S. 587, 588-9, nor *Sterling* v. *Constantin*, 287 U. S. 378, 386, cited by this Court in its *per curiam* opinion of April 3, 1944, dismissing the appeal herein, would seem to afford any authority whatever for such dismissal.

II. Neither the cited cases, nor the previous decisions of this Court upon which they are founded,* hold, as would

**Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 224; *Pacific Telephone & Telegraph Company* v. *Kuykendall*, 265 U. S. 196, 205; *Shaffer* v. *Carter*, 252 U. S. 37, 44.

be necessary to warrant the dismissal of this appeal, that where, as here, an appellant carrier has been subjected to heavy damages by the granting by a statutory court of an improvident interlocutory injunction against orders of the Interstate Commerce Commission according such appellant increased fares, the appeal *as of right* from the granting of such interlocutory injunction which such appellant has taken under Section 47, Title 28, U. S. C. A., is extinguished by merger in a subsequent appeal which such appellant has been compelled to take, *also as of right*, under the same section and Section 47a, from an equally improvident final injunction, whereby the injury to the appellant has been perpetuated and such damages tremendously increased.

III. Such a holding, it would seem, would contravene not only ordinary canons of statutory construction but ordinary common sense.

Such a holding would construe the appeal from an interlocutory injunction granted, *as of right*, by Section 47, as extinguished *ipso facto* by an appeal from a final injunction granted, also *as of right*, by that section and Section 47a, without the slightest warrant for such a construction either in the language of those sections, or in any considerations of necessity.*

---

*Obviously, had Congress intended any such *automatic* extinguishment of one appeal *as of right* by another and separate appeal *as of right*, it would have been simple and natural to have expressly so stated. It will subsequently be shown that there are certain cases where the appeal as of right from an interlocutory injunction is extinguished *by necessity* in an appeal as of right from a final injunction.

Such a holding would largely nullify the express provisions of Rule 65(c) of the Federal Rules of Procedure, which accords a defendant the absolute right to be secured against the damages which such defendant would incur by reason of a wrongful interlocutory injunction.

Such a holding would result, moreover, in the paradox that a defendant would be so secured only where the statutory court, having granted an improvident interlocutory injunction, should refuse to grant an improvident final injunction, but would be denied such security where, as here, the statutory court compounded the injury by granting both an improvident interlocutory and an improvident final injunction.

Finally, it is obvious that in both cases the preservation of the right to appeal from the granting of an interlocutory injunction is necessary to secure the determination by this Court as to whether such interlocutory injunction has been wrongfully granted, as a basis for the recovery of damages either under the Rule or in a suit for malicious prosecution.

IV. Such a holding, moreover, would preclude the determination of the novel question presented by this appeal, whether this appellant is deprived of its right to damages under Rule 65(c) because the statutory court here wrongfully refused, in contravention of that rule, to require appellee, Jersey City, to give security to protect appellant against such damages as appellant might suffer should it be found that such interlocutory injunction was wrongfully issued. The decisions of this Court in *Russell* v. *Farley*, 105 U. S. 433, and *Meyers* v. *Block*, 120 U. S. 206, would not seem determinative in this respect, since in those cases the right of the enjoined party to the protec-

tion of a bond against damages for the wrongful issuance of an interloctutory injunction rested in the discretion of the court and was not the absolute right accorded under Rule 65(c). Indeed, *Inland Steel Company* v. *United States,* 306 U. S. 153, 156, 157, and *Public Service Commission* v. *Brashear Freight Lines,* 312 U. S. 621, 628, 629, both decided since Rule 65(c) became effective, while citing the *Russell* and *Meyers* cases *supra,* make it extremely doubtful whether such earlier decisions apply under Rule 65(c).

In the *Public Service Commission* case, quoting the *Inland Steel* case, this Court said, p. 628:

> "It is obvious, and was obvious from the beginning, that the main damages would be suffered by the State of Missouri and not by these petitioners as individuals. It was to protect the state through its officials that the bonds were required. In making this requirement the court acted in harmony with the governing principle *'that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public —whose interests the injunction may affect' Inland Steel Co.* v. *United States,* 306 U. S. 153, 157." (Italics supplied)

Furthermore, in the Public Service Commission case, this Court said, page 629:

> "Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Russell* v. *Farley,* 105 U. S. 433, 444 *et seq.,* 26 L. ed. 1060, 1064; *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273."

It is particularly to be remarked that the case of *Pease* v. *Rathbun-Jones Engineering Company* cited in the above quotation was not a case involving an interlocutory injunction but involving the right of the District Court to assess damages against sureties on a supersedeas bond upon affirmance of the decree appealed from. The appellant contended that any damages could be recovered only by a suit on the supersedeas bond. In disposing of this contention, this Court said, p. 280:

> "The objection that a court of equity has no jurisdiction because there is an adequate remedy at law on the bond is not well taken. A court of equity, having jurisdiction of the principal case, will completely dispose of its incidents and put an end to further litigation. Applying this principle, equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds. See cases cited in the margin."

Appellant, therefore, submits that, since under Rule 65(c) it was in this case mandatory and not, as in the *Russell* and *Myers* cases, merely discretionary upon the part of the District Court to require a bond before issuing an interlocutory injunction, appellant should not be prejudiced by the District Court's refusal to obey the mandate of that Rule nor should appellee, Jersey City, be put in a better position than if the District Court had obeyed that Rule. On the contrary, it would seem that under the general equitable principle set forth by this Court in the *Inland Steel*, the *Public Service Commission* and the *Pease* cases, *supra*, the District Court should have full authority to award damages although no bond was taken.

V. Even assuming that appellant, in the absence of the giving of security under Rule 65(c), has no right to damages under that Rule, appellant is entitled to the determination by this Court whether the interlocutory injunction was wrongfully issued, as the basis of a suit for damages for malicious prosecution, or its legal equivalent, reckless prosecution.

VI. Irrespective of appellant's right to damages either under Rule 65(c) or for malicious prosecution, it would seem this Court should entertain this appeal in order:

(a) To avoid the implication that an appeal *as of right* under Section 47 from the granting of an interlocutory injunction is *ipso facto* and under all circumstances extinguished by merger by an appeal *as of right* under that section and under Section 47a from the granting of a permanent injunction.

(b) To make clear that a municipality is not exempted from the provisions of Rule 65(c) requiring as a condition precedent to the granting of an interlocutory injunction, that security be given against damages through wrongful issuance of such an injunction.

(c). To make clear that a municipality is not entitled to an interlocutory injunction if it lacks authority to give the security required by Rule 65(c).

(d) To make clear that it is an abuse of discretion for a statutory court to grant an interlocutory injunction in the complete absence of any proof that damage would result to a plaintiff pending final hearing should an interlocutory injunction not issue, and in the face of uncontroverted proof

that heavy and possibly irreparable damage would result to a defendant from the granting of such injunction."

Appellant believes that this Court may possibly have been misled into granting the Price Administrator's motion to dismiss appellant's appeal from the interlocutory injunction by the fact that appellant filed no reply to that motion.* The Court's attention, however, is particularly called to the fact that the Price Administrator's motion to dismiss was not based upon the ground in which the Court apparently based its order of dismissal, that is the alleged merger and extinction of the appeal as of right from the interlocutory injunction in the appeal as of right from the final injunction. On the contrary, the Price Administrator's motion to dismiss was based merely on the assertion that

> "The matter falls within the well established rule that an order of a three-judge court denying or granting an interlocutory injunction will not be dis-

---

*It is to be noted that the appellee, Jersey City, neither itself filed a motion to dismiss nor joined in the motion of the Price Administrator. It is further to be noted that, while the Price Administrator is expressly exempted from Rule 65(c) this exemption does not extend to Jersey City. The holding of the statutory court to the contrary is plainly erroneous and has been assigned as error by appellant.

It further seems clear that if the interlocutory injunction here appealed from was wrongfully issued, the fact that under Rule 65(c) appellant was entitled to no security from the United States or from an officer or agency thereof for damages against such wrongful issuance did not deprive appellant of the right to security from Jersey City against such damages even though the interlocutory injunction was issued at the joint suit of Jersey City and the Price Administrator. The exception of the Price Administrator from the requirements of Rule 65(c) is specific and, therefore, is not to be extended by implication.

turbed on appeal unless plainly the result of an improvident exercise of judicial discretion.

United Fuel Gas Co. v. *Public Service Commission*, 278 U. S. 322;
Alabama v. *United States*, 279 U. S. 229;
National Fire Insurance Co. v. *Thompson*, 281 U S. 331."

Since appellant's jurisdictional statement expressly set out, as required by Rule 12(1) of this Court, the respects in which appellant claims that the statutory court had abused its discretion in granting the interlocutory injunction appealed from, appellant believed no reply required to the Price Administrator's motion to dismiss, as such motion would seem at most to have tendered an issue as to whether the statutory court had abused its discretion. This issue, appellant believed, could not properly be determined merely upon the motion to dismiss since it went to the merits of the appeal. In any event, this Court, as has been noted, did not dismiss on any such ground but on the ground of merger.

It may be suggested that appellant should have anticipated that this Court might consider the cases cited in its *per curiam* opinion as constituting authority for the dismissal of this appeal upon the Court's own motion. There are several answers to any such suggestion:

First, appellant believed that the nature of this case, as stated in appellant's jurisdictional statement, clearly precluded the applicability of the cited cases.

Second, both the Price Administrator and Jersey City were apparently of the same opinion since neither made a motion to dismiss based on the cited cases or on any theory

that, under the circumstances of this case, the appeal from the interlocutory injunction was merged and extinguished by the appeal from the permanent injunction.

Third, the cited cases, as appellant will undertake briefly to show, afford in fact no authority for the dismissal of this appeal either on the ground of merger or on any other ground.

I

NEITHER *SMITH* v. *ILLINOIS BELL TELEPHONE COMPANY, SUPRA*, NOR *STERLING* v. *CONSTANTIN, SUPRA*, CITED BY THIS COURT IN ITS *PER CURIAM* OPINION OF APRIL 3, 1944, DISMISSING THE APPEAL HEREIN, WOULD SEEM TO AFFORD ANY AUTHORITY WHATEVER FOR SUCH DISMISSAL.

NEITHER WOULD ANY SUCH AUTHORITY SEEM TO BE AFFORDED BY THE PRIOR DECISIONS OF THIS COURT UPON WHICH THE CITED CASES ARE BASED, *I.E., CHAMPLIN REFINING COMPANY* v. *CORPORATION COMMISSION, SUPRA, PACIFIC TELEPHONE AND TELEGRAPH COMPANY* v. *KUYKENDALL, SUPRA*, AND *SHAFFER* v. *CARTER, SUPRA*.

Appellant here appealed from an interlocutory injunction restraining appellant and the Interstate Commerce Commission from putting into effect increased fares which the Commission had accorded appellant as reasonable maximum fares. Such interlocutory injunction was granted at the suit of appellee, Jersey City, and on the intervening petition of appellee, Price Administrator, in the total ab-

sence of probative evidence that damage would result pending final hearing to either appellee should such interlocutory injunction not be granted, and in the face of uncontradicted evidence that appellant would be damaged approximately $1,000 per day by the issuance of such interlocutory injunction.

In this case, as has been shown, appellant therefore should be entitled as of right, on appeal from the interlocutory injunction, to the determination by this Court whether such interlocutory injunction had wrongfully issued, since such determination is an indispensable condition precedent to the right to recover damages either under Rule 65(c) or in a suit for malicious prosecution. In neither of the cases cited by this Court in dismissing the appeal herein, nor in the previous decisions of this Court on which the cited cases were based, did any such situation exist.

In *Smith* v. *Illinois Bell Telephone Company*, the appellant was the Illinois Public Service Commission against which the District Court, at the suit of the appellee, had issued both temporary and permanent injunctions restraining the appellant from imposing confiscatory rates upon the appellee telephone company. This Court affirmed the permanent injunction and dismissed the appeal from the interlocutory injunction as merged in the appeal from the permanent injunction.

In *Sterling* v. *Constantin*, appellants were the Governor and other officials of the State of Texas against whom the District Court, at the suit of appellee oil producers, had issued temporary and permanent injunctions restraining, as unlawful, interference with the production of oil. Again this Court affirmed the permanent injunction and dismissed the appeal from the temporary injunction as merged in the

appeal from the permanent injunction, citing *Champlin Refining Company* v. *Corporation Commission, supra.*

It is obvious that in neither the *Smith* case nor the *Sterling* case could the respective interlocutory injunctions have been wrongful, nor could the respective appellants have suffered damage by reason of them. That the interlocutory injunctions were not wrongful was conclusively determined by this Court's affirmance of the respective permanent injunctions. That the respective appellants could not have been damaged is self-evident. No damage could have ensued to the appellant in the *Smith* case by being temporarily restrained from imposing confiscatory rates. No damage could have ensued to the appellants in the *Sterling* case by being temporarily restrained from unlawful interference with the production of oil. Therefore, no issue remained to be determined on the appeals from the respective interlocutory injunctions, in view of the determinations reached by this Court as to the permanent injunctions. Whether, therefore, such appeals from the interlocutory injunctions were extinguished by "merger" in the appeals from the permanent injunctions, or, more properly, became moot, is immaterial.* There was neither reason nor necessity for the survival of such appeals.

---

*It would seem that this Court in the *Smith* case and the other cited cases, in stating that an appeal from an interlocutory injunction is "merged" in a final decree or in an appeal from such final decree, used an inapt term to express what this Court really meant. It seems clear that in those cases this Court meant that under such circumstances an appeal from an interlocutory injunction is *extinguished* by a final decree or an appeal from a final decree rather than "merged". Indeed, the general equitable doctrine that an appeal from an interlocutory injunction is "merged" in an appeal from a final injunction (*Worden* v. *Searles*, 121 U. S. 14, 25, 26) is exactly to the contrary of the doctrine of the *Smith* case *et al.*

Champlin Refining Company v. *Corporation Commission, supra* (cited in the *Sterling* case), *Pacific Telephone & Telegraph Company* v. *Kuykendall, supra*, and *Shaffer* v. *Carter, supra* (both cited in the *Smith* case), were all cases where both interlocutory and permanent injunctions *were denied* by the respective District Courts and the appeals held merged were from such *denials* of interlocutory injunctions. However, in the *Champlin* case and in the *Pacific* case this Court reversed the denial of permanent injunctions, while in the *Shaffer* case this Court affirmed such denial.

In the *Smith* case, this Court, referring to this fact with respect to the *Shaffer* and *Pacific* cases, in its opinion, pages 588-9, said:

> "The appeal in No. 193 is from an order, previously entered, granting an interlocutory injunction. A motion to dismiss that appeal on the ground that the order for the interlocutory injunction had become merged in the final decree, was submitted but consideration postponed to the hearing on the merits.

Under the general equitable doctrine of merger not only has this Court held, as in the *Worden* case, that on an appeal from a final injunction the Court will consider the merits of an interlocutory injunction, but it has held that all interlocutory orders, including interlocutory injunctions, are reviewable on appeal from a final injunction without separate appeals from such interlocutory orders. *Spalding* v. *Mason*, 161 U. S. 375, 381; *Central Trust Company of New York* v. *Seasongood*, 130 U. S. 482, 491.

Since Sections 47 and 47(a) specifically provide for separate appeals from interlocutory and final injunctions, it is at least doubtful whether an appeal under either of those sections merely from a final injunction would constitute an appeal from an interlocutory injunction. It would nevertheless be paradoxical under any construction of the doctrine of equitable merger to hold that an appeal from a final injunction under those sections extinguishes *ipso facto* an appeal from an interlocutory injunction.

> The motion is now granted and the appeal in No. 193 dismissed. *Shaffer* v. *Carter*, 252 U. S. 37, 44; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 205. In the cases cited, both interlocutory and permanent injunctions had been denied; here they were granted; but *the record discloses no reason which prevents the same principle from being applicable.*" (Italics supplied)

Unfortunately, in the *Smith* case, this Court did not attempt to state the principle to which it referred in the italicized portion of its opinion as determining whether an appeal from an interlocutory injunction is merged and extinguished by an appeal from a permanent injunction. Furthermore, while this Court there plainly recognized that there might be circumstances under which there would be no such merger, it likewise unfortunately did not specify them. In any event, it may be stated that the *Smith* case recognized, at least by implication, that an appeal from an interlocutory injunction is not *ipso facto* merged and extinguished by an appeal from a final injunction.

Appellant believes the principle determining whether such merger and extinguishment does or does not take place is clear. That principle would seem to be that an appeal from an interlocutory injunction is merged and extinguished in an appeal from a final injunction only where the determination of the appeal from the final injunction renders moot the determination of the appeal from the interlocutory injunction.

This principle is consistent with all of the foregoing decisions of this Court in which it has held appeals from interlocutory injunctions merged and extinguished in appeals from final injunctions. *It is inconsistent, however, with the dismissal of the appeal in this case.*

Consistently with that principle, it may be stated categorically:

1. That an appeal from *the denial* of an interlocutory injunction is merged and extinguished *ipso facto* in an appeal from either a denial or a granting of a final injunction, and irrespective of the disposition made by this Court of the appeal relating to a final injunction. (The *Champlin, Pacific* and *Shaffer* cases are within this category).

This is because no damages are recoverable under any circumstances from *the denial* of an interlocutory injunction either under Rule 65(c) or under any other known equitable or legal rule or principle. Therefore, the mere granting or denial of a final injunction, whether or not appealed from, renders an appeal from the denial of an interlocutory injunction moot. In fact, there is no purpose in an appeal from *the denial* of an interlocutory injunction except in the unusual case where such appeal can be determined prior to final hearing. Once final hearing is had, whatever may be the determination reached, a reversal of *the denial* of an interlocutory injunction would be useless.

2. An appeal from *the granting* of an interlocutory injunction is merged and extinguished in an appeal from a permanent injunction *only* where a permanent injunction is *granted* and such granting is affirmed on appeal (the *Smith* and *Sterling* cases are within this category) or where a permanent injunction is denied and such denial is reversed on appeal.

3. An appeal from an interlocutory injunction *is not merged and extinguished* in an appeal from the granting of a final injunction where, *as here,* appellant has shown that if it be determined on appeal that the interlocutory injunc-

tion was wrongfully issued, appellant has incurred damages which may be recoverable either under Rule 65(c) or in a suit for malicious prosecution, and the granting of a final injunction is reversed on appeal. (None of the prior decisions of this Court were within this category).

This is because the determination here of the appeal from the final injunction did not render moot the determination of the appeal from the interlocutory injunction, since this Court's reversal of the final injunction left open the question whether the interlocutory injunction was wrongfully issued. Appellant, it is submitted, is therefore entitled as of right to the determination of this latter question since, as already shown, such determination is an indispensable condition precedent to such further proceedings as may be necessary to enable appellant to recover damages either under Rule 65(c) or for malicious prosecution.

CONCLUSION.

Appellant respectfully submits therefore that this Court should set aside its order of April 3, 1944 dismissing this appeal and thereupon should determine whether the interlocutory injunction here appealed from was wrongfully issued; and, should it be determined that such interlocutory injunction was wrongfully issued, should remit appellant to such rights as it may have to recover damages either under Rule 65(c) or in a suit for malicious prosecution.

Appellant further submits that, irrespective of any question of recovery of damages by appellant, this Court should entertain this appeal *as of right* because, as said by this Court, in granting the *discretionary writ* of certiorari in

Public Service Commission v. *Brashear Freight Lines*, *supra*, p. 624:

> "* * * We granted certiorari, 311 U. S. 642, primarily because *of the procedural importance of determining the statutory function of a three judge court in dealing with questions such as those here presented.*" (Italics supplied)

Respectfully submitted,

JOHN F. FINERTY
JOHN E. BUCK
THOMAS A. HALLERAN
Counsel for Appellant Hudson & Manhattan Railroad Company

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 1 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

Answer of Appellee, City of Jersey City, to the Motion of the Appellant for Leave to File a Petition for Rehearing of This Court's Order of April 3, 1944, Dismissing the Appeal Herein.

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.

CHARLES HERSHENSTEIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,

Appellant,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

Answer of Appellee, City of Jersey City, to the Motion of the Appellant for Leave to File a Petition for Rehearing of This Court's Order of April 3, 1944, Dismissing the Appeal Herein.

To the Honorable the Supreme Court of the United States:

Appellant, Hudson and Manhattan Railroad Company, moves this Court for an order granting said appellant leave to file within fifteen (15) days after the entry of such order, a petition for the rehearing of the Order of this Court of April 3, 1944, granting the motion dismissing the above appeal.

Answering said motion, this appellee respectfully states:

1. The above appeal was taken to this Court by the Hudson & Manhattan Railroad Company from the granting of

the interlocutory injunction issued by the court below. Thereafter, the appellant proceeded with the final hearing in the court below and after a final injunction was awarded took an appeal to this Court from said final injunction (No. 767, October Term, 1943).

2. Upon motion, this Court on April 3, 1944, dismissed the appeal from the interlocutory injunction and entered the following *per curiam* opinion:

> "*Per curiam*: The motion to dismiss is granted and the appeal is dismissed. Smith v. Illinois Bell Telephone Co., 270 U. S. 587, 588-9; Sterling v. Constantin, 287 U. S. 378, 386."

3. This Court properly dismissed the appeal from the interlocutory injunction because the interlocutory injunction merged in the final decree which permanently enjoined the orders of the Interstate Commerce Commission and said final injunction superseded the operative effect of the interlocutory injunction. A determination of the appeal from the said interlocutory injunction, as well as the propriety of its issuance have become moot.

4. The dismissal by this Court of the appeal from the interlocutory injunction was not provisional nor conditioned upon the outcome of the appeal from the final injunction. For all intents and purposes the interlocutory injunction no longer existed at the time the appeal was taken from the final injunction issued by the lower court. Thus in effect, by this motion, appellant railroad is now asking this Court to revive a temporary injunction which no longer exists, for the purpose of reversing it.

5. Appellant railroad company, in its motion papers which lead to the dismissal of the above appeal on April

3, 1944, indicated its real motive in seeking to continue with the appeal, when it stated that it contemplated to maintain an action for damages against appellee, City of Jersey City, by reason of appellee's "reckless, if not malicious," prosecution of the application for the interlocutory injunction. We urged then, and again earnestly respectfully submit now, that the railroad company is not justified in asking this Court to lend its dignity toward aiding a prosecution, in some collateral proceeding of a claim for damages by one of the parties to the appeal against the other.

We therefore respectfully submit that the motion of the appellant should be denied.

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.

CHARLES HERSHENSTEIN,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 7 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

THE INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY,
Appellants,

vs.

THE CITY OF JERSEY CITY, FRED M. VINSON, STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

DANIEL W. KNOWLTON,
Chief Counsel;
E. M. REIDY,
Assistant Chief Counsel,
For the Interstate Commerce Commission.

JAMES B. EMORY,
JOHN E. BUCK,
THOMAS A. HALLERAN,
JOHN F. FINERTY,
For the Hudson & Manhattan Railroad Company.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions	1
The statute of a state, or the statute or treaty of the United States, the validity of which is involved	2
Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented	3
Nature of case and rulings below	3
Nature of case	4
Rulings below	19
Cases sustaining the Supreme Court's jurisdiction of the appeal	24
Opinion and decree of the District Court	24
Appendix "A"—Majority opinion of the District Court	26
Appendix "B"—Dissenting opinion of Judge Fake	34
Appendix "C"—Findings of fact and conclusions of law of District Court	39
Appendix "D"—Final decree of the District Court	53

Table of Cases Cited.

Alton R. Co. v. *United States*, 287 U. S. 229	24
Ann Arbor Railroad Company v. *United States*, 281 U. S. 658	24
Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74	24
Florida v. *United States*, 282 U. S. 194	24
Hudson & Manhattan R. Co. v. *United States*, 36 Fed. Supp. 495, 313 U. S. 98	21
Interstate Commerce Commission v. *Hoboken Man. R. Co.* (decided December 6, 1943)	24
Interstate Commerce Commission v. *Railway Labor Executive Association*, 315 U. S. 373	24

Page

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541 24

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1 24

New England Divisions Case, 261 U. S. 184 24

Passenger Fares of Hudson & Manhattan R. Co., 227 I. C. C. 741, 255 I. C. C. 649, 256 I. C. C. — 3

Philadelphia Coke Company v. *Bowles* (U. S. Emergency Court of Appeals, decided December 15, 1943) 22

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454 24

United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 294 U. S. 499 24

United States v. *Lowden*, 308 U. S. 225 24

United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490 24

Washington Gas Light Co. v. *Byrnes*, 137 F. (2d) 547 22

STATUTES CITED.

Emergency Price Control Act of 1942 (Act January 30, 1942, Title 50, U. S. C. Secs. 901, et seq.) 2

Interstate Commerce Act:

Section 1 20

Section 15a 20

Inflation Control Act (Stabilization Act) of 1942 (Act October 2, 1942, Title 50 U. S. C. Secs. 961, et seq.) 2

Urgent Deficiencies Act of October 22, 1913 2

United States Code, Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219) 2

United States Code, Title 28, Section 44 (Act. of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938) 2

United States Code, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220) 2

Page

United States Code, Title 28, Section 47a (Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220) 1

United States Code, Title 28. Section 345 (Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157, January 28, 1915, c. 22, Sec. 2, 38 Stat. 804, February 13, 1925, c. 229, Sec. 1, 43 Stat. 938) 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 3073

CITY OF JERSEY CITY,

and *Plaintiff,*

FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR,

vs. *Intervenor,*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY,

Defendants.

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

The defendants-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are:

U. S. C. Title 28, Section 47a [Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 41 (28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C. Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

U. S. C. Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 345 [Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

B. **The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved.**

The validity of a statute of a State, or of a statute or treaty of the United States, is not involved.

There are involved, however, the following questions as to the construction of certain statutes of the United States:

(a) How far, if at all, the powers of the Interstate Commerce Commission under Part I of the Interstate Commerce Act (Title 49, Chapter 1, U. S. C.), to determine, prescribe, and authorize just and reasonable rates in interstate commerce for a common carrier by railroad are affected or modified by the provisions of the Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 et seq.), and by the Inflation Control Act (Stabilization Act) of 1942 (Act. Oct. 2, 1942, Title 50, U. S. C., Secs. 961 et seq.).

(b) Whether the interest of the intervenor, as the agency designated by the President under the provisions of said Inflation Control Act to receive notice of any general increase in the rates or charges of any com-

mon carrier over those in effect September 15, 1942, and to intervene before the Federal, State or municipal authority having jurisdiction to consider such increase, is limited under such intervention before the Interstate Commerce Commission to the question whether such increase in rates or charges will result in inflation or increased cost of living in contravention of the provisions of said Inflation Control Act and of said Emergency Price Control Act, or extends to the question whether such increase is reasonable and otherwise lawful under the provisions of said Interstate Commerce Act, irrespective of whether it will result in such inflation or increased cost of living.

C. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The order and decree sought to be reviewed was entered on January 14, 1944. The petition for appeal, together with an assignment of errors, was presented on February 9, 1944.

D. Nature of Case and of Rulings Below.

This is an appeal from a final order and decree of the District Court of the United States for the District of New Jersey entered January 14, 1944, setting aside, annulling and perpetually enjoining two orders of the Interstate Commerce Commisison, respectively of June 8, 1943 and November 2, 1943, in I. & S. Docket No. 394, *Passenger Fares of Hudson & Manhattan R. Co.*, 255 I. C. C. 649, 256 I. C. C. so far as said orders permit the establishment of any local interstate fare in excess of 8 cents for transportation on the downtown line of the defendant Hudson & Manhattan Railroad Company, and further ordering and decreeing that such proceedings be remanded to the Interstate Commerce Commission for further hearing and reconsideration

in accordance with the views expressed in the opinion of the District Court.

The Commission's order of June 8, 1943, authorized the defendant Hudson & Manhattan Railroad Company to charge a 9 cent fare on its downtown line.

The Commission's order of November 2, 1943, authorized said defendant to charge in lieu of said 9 cent fare previously authorized, alternative fares of 11 tokens for $1 or a cash fare of a dime, provided, however, that such alternative fares should also be made applicable to said defendant's uptown line upon which the authorized and existing fare was 10 cents.

Both the Commission's order of June 8, 1943 and of November 2, 1943, were limited to the duration of the war and six months thereafter.

On hearing, an interlocutory injunction was granted by said Court on November 26, 1943, against the same orders of the Commission, from which interlocutory injunction an appeal by the defendant Hudson & Manhattan Railroad Company has likewise been taken to the Supreme Court of the United States.

I.

Nature of Case.

A statement of the historical background to show how the case arose is essential. Unfortunately, because the rulings of the Court below were based on questions of fair hearing, of estoppel and of failure to exhaust administrative remedies, such statement must be longer than would otherwise be desirable.

The Commission issued an original report in these proceedings on July 11, 1938 (227 I. C. C. 741), denying the defendant carrier the right to increase its fares on its downtown line from 6 to 10 cents but authorizing an increase to

8 cents. Commissioners Miller and Mahaffie dissented on the ground that the Commission should have authorized the proposed 10 cent fare on the carrier's downtown line. Commissioner Eastman did not participate.

The carrier sought an injunction in the same District Court against the Commission's order limiting it to such 8 cent fare and in an opinion by District Judge Fake the order was sustained (36 Fed. Supp. 495). On appeal by the carrier to the Supreme Court of the United States the order of the District Court was affirmed in a *per curiam* opinion. (313 U. S. 98).

Upon petition of the carrier alleging fundamentally changed conditions and asking the Commission to reconsider its denial of a 10 cent fare on such downtown line, the Commission by its order of July 13, 1942, reopened the proceedings for further hearing. Full and elaborate hearings were held at which the intervenor appeared but offered no testimony whatever. On the contrary the intervenor in his exceptions to the Examiner's report filed subsequent to such hearings, expressly conceded:

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."

The intervenor did contend that such increased fare in conjunction with other increased costs of living would result in an inflationary spiral but offered no evidence whatever in this or any other respect.

On or about January 25, 1943, the Examiner issued a proposed report recommending that the carrier be permitted to increase its fare on its downtown line to 10 cents.

On April 20, 1943, argument on such proposed report was held before the entire Commission. On such argument, an exhibit was filed upon stipulation of the parties, showing

the carrier's traffic and revenue for the first two months of 1943—the latest figures then available.

Thereafter, the Commission made its report, findings and order of June 8, 1943 (one of the two orders here enjoined). The Commission overruled the Examiner's recommendation that the carrier be permitted to increase the fare on its downtown line to 10 cents and limited the increase to 9 cents, although the carrier had presented some evidence that, by reason of the physical limitations of its fare collection boxes, which limitations could not be obviated, it would be impossible to collect a 9 cent cash fare.

Commissioners Miller and Mahaffie again dissented, being joined by Commissioner Patterson, on the ground that the record fully justified such increase. Commissioner Miller, concurring in part, stated:

> "I concur in the finding of the majority insofar as it gives approval to increasing the present fare to 9 cents. In my dissent to the prior report, 227 I. C. C. 741, I expressed the view that the record there amply justified a finding that the proposed fare of 10 cents would be reasonable and lawful for the services performed by this respondent. Nothing is presented as a result of the further hearing to cause me to change that opinion.
>
> "Moreover, I see no sufficient reason for here limiting the time during which the 9 cent fare shall remain in effect.
>
> "I am authorized to state that Commissioners Mahaffie and Patterson join in this expression."

Commissioner Aitchison did not participate in the disposition of this proceeding.

On July 8, 1943, the carrier filed a sworn petition for reconsideration and modification of the Commission's findings and order of June 8, 1943. The petition set out in greater detail the facts of such physical limitations of its fare col-

lection boxes and facts showing that the only means of practical compliance with the Commission's findings and order of June 8, 1943 would be to charge, in place of the uncollectible 9 cent cash fare, alternative fares of 11 tokens for $1 or a cash fare of a dime, applicable both to the carrier's downtown and uptown lines. The petition asked that authority be granted to charge such fares as soon as tokens could be obtained and the carrier's fare collection boxes modified, and, in the meantime, to charge a straight 10 cent cash fare on the carrier's downtown line. It also asked the Commission to eliminate the limitation on such increased fares to the period of the war and six months thereafter. The petition asked that any party to such proceedings who might be opposed to the granting of the petition be required to file a verified reply thereto within ten days and that the Commission, upon the basis of such petition and any replies, determine without further hearing the issues thereby presented. As ground for such procedure, there was attached to the petition an affidavit showing that, since the effective date of the Commission's order of June 8, 1943, the carrier had suffered a loss in excess of $1,000 per day because of its inability to collect the authorized 9 cent cash fare and that the carrier will continue to lose such amount until the proposed alternative fares should become effective.

The plaintiff, without itself filing any petition for reopening or reconsideration of the Commission's order of June 8, 1943, as permitted by the Commission's General Rules of Practice, on July 14, 1943 filed an unverified reply to the carrier's petition. That reply alleged *inter alia:*

> "It is the position of protestants that the petition should be denied and that the effect of the decision, dated June 8, 1943, should be indefinitely suspended, and, in view of the questions and assertions now brought forth by the respondent, that the proceeding

should be set for further hearing. Otherwise, the petition, in its entirety, should be denied."

In such reply, the intervenor stated:

> "In view of Petitioner's tremendously improved current earnings, it is requested that the Commission reconsider its proposed modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."

It should be noted that, under the Commission's General Rules of Practice, these statements in the respective replies of the plaintiff and intervenor did not constitute a petition for reconsideration or reopening of the Commission's order of June 8, 1943 in either form or substance and, in any event, were filed after the time had expired under those rules for such a petition.

The intervenor also filed a substantially similar and unverified reply to the carrier's petition.

The Commission on August 3, 1943, issued a report, findings and order based upon the carrier's petition and such unverified replies, and without further hearing. After noting that it had overlooked the evidence introduced by the carrier prior to the Commission's order of June 8, 1943, showing that it would be impossible for the carrier to collect a 9 cent cash fare, and also noting that on this account the carrier was losing in excess of $1,000 a day of the revenue the Commission had intended to accord the carrier by such order, and on a specific finding that it would be impossible for the carrier to collect a 9 cent cash fare, the Commission found:

> "Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased

local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line."

The Commission, however, denied so much of the carrier's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied the carrier the right to charge a 10 cent cash fare on its downtown line pending its ability to obtain tokens and modify its fare collection boxes. Commissioners Miller, Mahaffie and Patterson again dissented on the ground that on the record before the Commission it should authorize a straight 10 cent fare on the carrier's downtown line. Commissioner Aitchison did not participate.

On September 13, 1943, the plaintiff filed its original complaint in these proceedings specifically asking that the Commission's order of August 3, 1943, be enjoined only

> "in so far as such order permits the establishment of any local interstate fare in excess of 9 cents for transportation on the downtown line."

Said complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> "17. It is apparent that the Commission, in authorizing local downtown fares in excess of the nine cent fare stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649,

does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff herein has been deprived of its full day in Court by not having been given an opportunity to cross-examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered such matters in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure."

While the intervenor did not formally intervene in such original complaint, his counsel on a subsequent hearing on September 28, 1943 before the Commission, hereinafter referred to, stated that he did not so intervene because of the Commission's order of September 18, 1943, reopening the proceedings, to which reference will now be made.

On September 18, 1943, the Commission of its own motion reopened the proceedings for further hearing. The grounds on which it acted are stated in the Commission's report of November 2, 1943, as follows:

"On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been 'deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *.' *Accordingly, out of an abundance of caution,* by order of September 18, 1943, we reopened this proceeding for further hearing 'to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943,' and to afford 'any party hereto * * * the right to cross-examine adverse witnesses.' Such further hearing has been held, and upon the filing of briefs the matter has been submitted for our further decision." [Italics supplied.]

On the further hearing held under the Commission's order of September 18, 1943, the carrier offered evidence to show that it was impossible, because of the physical limitations of its fare collection boxes, which could not be obviated, to collect a cash fare of 9 cents and that the only practical means of substantial compliance with the Commission's order of June 8, 1943 would be to apply both to the downtown and uptown lines alternative fares of 11 tokens for $1.00 or a cash fare of one dime.

The carrier, in order to show that it was losing in excess of $1,000 a day through its inability to collect the authorized 9 cent fare, *itself introduced an exhibit showing passenger traffic and revenue for the eight months ended August 31, 1943, adjusted to twelve months.*

On such further hearing, held September 28 and 29, 1943, plaintiff offered no evidence whatever within the limitations of the Commission's order. The only evidence offered by the intervenor in this respect was confined to an effort to prove that the carrier's estimate of the potential ratio of use of token fares to cash fares under such alternative fares was erroneous.

Both the plaintiff and the intervenor, however, endeavored to offer certain evidence and to develop by cross-examination certain data with reference to the current revenues and operating expenses of the railroad company, for the professed purpose of showing that, because of the increase in traffic, the carrier would earn revenue in excess of that to which the plaintiff and intervenor claimed the Commission had intended to limit the carrier under its order of July 11, 1938, and to show that, under a continuance of its existing 8 cent fare, the carrier would earn its full current bond interest requirements, all for the ultimate purpose of showing that the carrier was not en-

titled to 9 cents on its downtown line, authorized by the Commission's order of June 8, 1943, but should be restricted to the 8 cent fare authorized by the Commission's order of July 11, 1938.

Included in such offered evidence was a condensed corporate income statement of the Hudson & Manhattan Railroad Company for the seven months ending July 31, 1943. A similar statement for the five months ending May 31, 1943 had been attached to the reply of the intervenor of July 19, 1943 to the carrier's petition of July 8, 1943 for reconsideration and modification of the Commission's findings and order of June 8, 1943. In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of the Hudson & Manhattan Railroad Company from railroad operations but was a consolidated statement of the income of that company from all operations, including its Hudson Terminal Buildings and other real estate.

The Examiner rejected such evidence and refused to permit such cross-examination as not being within the limitations of the Commission's order of reopening of September 18, 1943 but specifically advised counsel for the plaintiff and intervenor that if they desired to broaden the issues, they could petition the Commission for a modification of that order for the purpose of receiving the rejected evidence and cross-examination.

On October 14, 1943, the intervenor filed a petition for modification of the Commission's order of September 18, 1943,

> "to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the

company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942."

The only specifications in such petition of the purpose of adducing such evidence read as follows:

"8. Counsel for the protestants stated if given an opportunity to demonstrate by presentation of evidence at the hearing he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase (R-2448 ff). Such opportunity was denied".

On October 25, 1943, the carrier filed a reply to the intervenor's petition, pointing out that the plaintiff had neither filed an independent petition nor joined in that of the intervenor, and alleging that the plaintiff's failure so to do was occasioned by plaintiff's recognition that it would stultify the plaintiff's original complaint then pending before the District Court, which in substance asked that the Commission and the carrier be required to abide by the Commission's order of June 8, 1943 authorizing a 9-cent fare on the downtown line. Such reply also pointed out that the Commission neither under its order of July 11, 1938 nor under its order of June 8, 1943, had undertaken to limit the revenue which the carrier might earn under the 8-cent and 9-cent fares therein respectively authorized, but had merely estimated what revenue the carrier would earn under such fares in view of existing competition in other forms of transportation; further, that the carrier plainly was not

limited by law to earning merely its current interest on its bonds.

By a letter dated October 25, 1943, counsel for plaintiff purported to

> "'adopt and otherwise ratify the contents of the aforesaid (intervenor's) petition as though it were our own.'"

This letter did not comply with the Commission's General Rules of Practice either as to form, content, time, or service of petitions for rehearing, reargument, or reconsideration, and consequently was not treated as such by the Commission in its report of November 2, 1943.

On November 2, 1943, the Commission issued its report and order which the District Court has enjoined.

The Commission's report, after reciting, as already quoted, that they had issued their order of reopening of September 18, 1943 "out of an abundance of caution" states, with reference to the further hearing held on September 28 and 29 under that order:

> "At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding 'for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942,' called the Stabilization Act. To this motion respondent replied. Movant states that he

wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted."

The Commission then states:

"In the complaint of the City of Jersey City before the District Court [i. e. the original complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to 9-1/11 cents."

The Commission then concludes:

"At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled."

Having reached these conclusions, the Commission then made the following findings of fact, which it underscored in its report, stating under each finding the evidence of record upon which such finding was based. For the sake of brevity such statements of the evidence underlying such findings are here omitted. The findings themselves are as follows:

"Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.*

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.*

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.*

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report (i. e. June 8, 1943) as necessary to insure adequate transportation service.*

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.*

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.*

The Commission then stated:

"Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we af-

firm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and maintenance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.

Respondent asks for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in section 6(3) of the act. A downtown fare of 9 cents was approved by us on June 8, 1943, and, in the ordinary course, if collectible, that fare would now have been in effect for about 4 months. Accordingly, we feel warranted in exercising the powers given to us in section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice.

An order overruling the aforesaid motion of the Director of Economic Stabilization, and granting permission to respondent to establish the fares herein approved upon not less than 15 days' notice, will issue."

Commissioners Miller, Mahaffie and Patterson reiterated their view, previously expressed in connection with the Commission's reports and orders of June 8, 1943, and August 3, 1943, that the Commission should have authorized the carrier to charge a straight 10 cent fare on its downtown line. Commissioner Atchison again did not participate.

On November 18, 1943, plaintiff filed its amended complaint herein asking that the Commission's orders of June 8, 1943 and November 2, 1943 be perpetually set aside, annulled and enjoined insofar as they permitted any fare on the carrier's downtown line in excess of 8 cents (the fare

authorized by the Commission's order of June 11, 1938). The basic ground of such amended complaint was (a) that the carrier because of increase in traffic did not need the 9 cent fare authorized by the Commission's order of June 8, 1943, and (b) that the Commission in issuing its order of November 2, 1943, had done so without according full hearing because of its refusal to receive the evidence and permit the cross-examination excluded by the Examiner at the hearing on reopening under the Commission's order of September 18, 1943.

The intervenor filed its petition of intervention asking similar relief and making similar allegations, but in addition alleging that the Commission's orders permitting an increase in the 8 cent fare in effect on the carrier's downtown line on September 15, 1942 (i. e. the fare authorized by the Commission's order of June 11, 1938) were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942.

The defendant United States of America filed a neutral answer on the ground that a question of the relative powers of two agencies of the government were involved.

The defendant, Interstate Commerce Commission, and the defendant carrier, Hudson & Manhattan Railroad Company, filed their respective answers to the amended complaint and to the intervenor's petition of intervention. Said answers, in substance, admitted the making of the orders of June 8, 1943 and November 2, 1943; denied that plaintiffs were not accorded a full and fair hearing; denied that said orders contravened either the Emergency Price Control Act or the Stabilization (Inflation Control) Act; and alleged that said orders were made after a full hearing and consideration of the evidence and argument of all parties and were fully supported by evidence before the Commission and by the Commission's findings based on such evidence.

In addition, the carrier in its answer and the Interstate Commerce Commission in its amended answer, alleged that neither the plaintiff nor the intervenor had exhausted their administrative remedies before the Commission; moreover, that both were estopped from seeking an injunction against the Commission's orders of June 8, 1943, and November 2, 1943 (a) because the original complaint herein asked an injunction against the Commission's order of August 3, 1943 only in so far as it authorized fares higher than the 9 cent fare authorized by its order of June 8, 1943 and only on the ground that a hearing had been denied as to such increase over 9 cents and (b) because the Commission was thereby induced to make its order of September 18, 1943 reopening the proceedings for the specific purpose of according a hearing on the sole issue on which a hearing was alleged to have been denied, i. e., the increase over its previously authorized 9 cent fare; and (c) because of other conduct of the plaintiff and the intervenor subsequent to such reopening.

II.

Rulings Below.

Both the plaintiff and the intervenor applied for an interlocutory injunction, which was granted November 26, 1943, and from which the carrier has taken an appeal to the Supreme Court of the United States.

Final hearing was had on December 14, 1943. On January 12, 1944, the majority of the Court, Judges McLaughlin and Meaney, granted the final order and decree, Judge Fake dissenting.

The opinion of the Court disposed of the matters involved under two headings, (1) "Full and Fair Hearing", and (2) "Economic Stabilization." It stated that in view of the conclusions which it reached under these headings "There

is no necessity for discussing the other points raised by the plaintiff and intervenor."

Under the heading "Full and Fair Hearing", the Court held:

First, that the enjoined orders of the Commission were based on Section 15(1) of the Interstate Commerce Act,* although neither of the enjoined orders so stated and although the original order to which they were amendatory was expressly based on both Section 1 and Section 15(a) of the Act.

Second, that on this assumption the plaintiff and intervenor had been denied full hearing by reason of the Commission's refusal to reopen the proceedings to receive evidence relating to the 1943 earnings of the carrier "for the purpose of showing that, under such earnings, no increase in fare whatsoever was justified." In this connection the Court quoted that portion of the Commission's report of November 2, 1943, reading as follows:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report [report and order of June 8, 1943] * * * the motion will therefore be overruled."

In connection with this language, the majority opinion said:

> "Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. *It actually considered the proposed evidence and decided that, despite it, its decision should stand.* The municipal plaintiff and the intervenor, by their evidence, offered to show that the carrier's rise in business and net earn-

* The majority presumably meant to refer to Section 15(a)—the so-called "Revenue" section of the Act.

> ings had completely removed any reason for an increase over the 8 cent fare. *In refusing to consider such testimony* which, under the terms of its tender went to the heart of the controversy, in our judgment, the Commisison did act arbitrarily and contrary to the mandate of its statute." [Italics supplied.]

The contradiction between the two italicized statements in the majority opinion is patent. The statement first italicized is obviously consistent with the Commission's own statement of its action as quoted by the Court.

Third, that the plaintiff and intervenor had exhausted their administrative remedies. Here the Court ignored the fact that neither the plaintiff nor the intervenor had ever within the Commission's rules of practice filed any petition for reopening, rehearing and reconsideration of the Commission's orders of June 8, 1943, and August 3, 1943, and that only the intervenor had petitioned for modification of the Commission's order of September 18, 1943.

Fourth, the Court made no reference to the issue of estoppel, except to say

> "We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above." [i. e., denial of full hearing]

Apparently the Court confused the question of estoppel with the question of refusal to exhaust administrative remedies. See the Court's finding of fact No. 30. In any event, the Court made no reference whatever to the fact that the original complaint herein asked an injunction against the Commission's order of August 3, 1943, only in so far as it authorized fares higher than the 9-cent fare authorized by its order of June 8, 1943, and only on the ground that hear-

ing had been denied solely as to such increase over 9 cents. Neither did the Court make any reference to the fact that the Commission itself stated that it issued its order of September 18, 1943, reopening the proceeding, "out of an abundance of caution" and for the specific purpose of according a hearing on the sole issue it was alleged to have denied one.

Under the heading "Economic Stabilization" the Court held that the Commission had not given sufficient consideration to the importance of this issue. It quoted only the Commission's conclusion with respect thereto in its report of June 8, 1943; omitted any reference to the facts shown by the Commission's report that the intervenor had presented no evidence whatever; omitted all reference to the intervenor's express admission that

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine.";

and omitted any reference to the Commission's lengthy discussion nevertheless in that report of the intervenor's contentions in its briefs in this respect. It based its ruling that the Commission had not sufficiently considered this question solely on the case of *Philadelphia Coke Company* v. *Chester Bowles*, United States Emergency Court of Appeals, December 15, 1943, and ignored, without mention, the decision of the Circuit Court of Appeals for the District of Columbia in *Washington Gas Light Company* v. *Byrnes*, 137 F. (2d) 547), which the defendants had cited to the Court.

Finally, the Court neither in its opinion, findings of fact nor conclusions of law, found that the Commission's orders of June 8, 1943, and November 2, 1943, were without evidence to support them or found that had the evidence which the Commission rejected been received, the Commis-

sion could not, as a matter of law, have made those orders.

Judge Fake dissented on five grounds:

First, that there was ample evidence to sustain the Commission's orders;

Second, that whether the excluded evidence would have changed the Commission's conclusions was a question for the Commission and not the Court to determine since there otherwise was evidence to sustain those conclusions;

Third, that the majority opinion invaded the province of the Commission in undertaking to determine when the Commission might in its discretion close a record;

Fourth, that the Commission had properly exercised such discretion in this case; and

Fifth, that the majority opinion also undertook to invade the province of the Commission in considering the subject of inflation which, Judge Fake pointed out, the very Executive Orders quoted by the majority recognized to remain with the Commission.

The questions presented by this appeal are substantial. Aside from the serious effect of the injunction upon the revenues of the defendant Hudson & Manhattan Railroad Company, the decision of the lower Court, if allowed to stand, would establish principles which would have far-reaching effects in permitting the Director of Economic Stabilization to impinge upon the jurisdiction of the Commission. In this respect, the appeal involves the first case under the Urgent Deficiencies Act of October 22, 1913, respecting the effect of the Emergency Price Control Act and of the Inflation Control Act on the administration by the Interstate Commerce Commission of its powers and duties under the Interstate Commerce Act to prescribe just and reasonable rates. Moreover, it involves the important question whether the Interstate Commerce Commission

may be deprived of the power to make an effective decision through denial of its right to determine as an administrative matter when a record involving continually changing economic conditions may be properly closed.

E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

New England Divisions Case, 261 U. S. 184;

Alton R. Co. v. *United States*, 287 U. S. 229;

United States v. *Northern Pacific Ry Co.*, 288 U. S. 490;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98;

Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U. S. 373; and

Int. Com. Com. v. *Hoboken Man. R. Co.*, decided December 6, 1943.

F. Opinion and Decree of the District Court.

Appended to this statement are copies of (1) the opinion of the District Court dated January 12, 1944, (2) the

findings of fact and conclusions of law of said Court dated January 12, 1944, and (3) the final decree of said Court sought to be reviewed, dated January 14, 1944.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated February 9, 1944.

DANIEL W. KNOWLTON,
Chief Counsel.
E. M. REIDY,
Assistant Chief Counsel,
(*For the Interstate Commerce Commission*).
JAMES B. EMORY,
Collins & Corbin.
JOHN E. BUCK,
THOMAS A. HALLERAN,
JOHN F. FINERTY,
(*For Hudson & Manhattan Railroad Company*).

APPENDIX "A".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants.*

Opinion.

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges.

McLAUGHLIN, *Circuit Judge:*

In this case the plaintiff, City of Jersey City, New Jersey, and the intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, prayed this Court to set aside, annul and perpetually enjoin, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.) the rate order issued by Interstate Commerce Commission on June 8, 1943 in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649), and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —). The order of June 8, 1943 authorized the said carrier to increase the fare on its downtown line (extending from Jersey City and Hoboken, New Jersey to Hudson Terminal in downtown New York City, New York) from eight to nine cents, for the duration of the war and six months thereafter, or until otherwise ordered by the Commission. The supplemental order of November 2, 1943 authorized the carrier, in lieu

of the nine cent downtown fare, to charge a cash fare of ten cents or a token fare on a basis of eleven tokens for one dollar, upon establishing an identical fare on the carrier's uptown line; the present uptown fare being ten cents, without a token fare. On November 26, 1943, after a hearing, this Court issued an interlocutory injunction suspending the enforcement of said rate orders pending final hearing on the merits.

FULL AND FAIR HEARING.

At the outset we are confronted with the vitally important question of whether the plaintiff and intervener were given a full and fair hearing by the Commission. From the facts, the petition by the carrier to the Commission, was one for additional revenue. The orders of the Commission were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing. The United States Supreme Court in Interstate Commerce Commission *v.* Louisville and Nashville Railroad Co., 227 U. S. 88, 33 Sup. Ct. Reports 185, stresses this. The Supreme Court said in that case at page 93:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. *v.* Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always

be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States *v.* Baltimore & Ohio S. W. R. R., 226 U. S. 14."

In the report and order of the Interstate Commerce Commission of June 8, 1943 appears the following:

"Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about 30 percent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

The same report and order also stated:

"It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

Following that order of June 8, 1943, the carrier filed a supplemental petition alleging inability to collect the allowed nine cent fare and asking for a token fare which amounted to nine and one-tenth cents and in the alternative, a ten cent cash fare. The intervener filed an answer to that supplemental petition asking that the Commission

"'in view of petitioner's tremendously improved current earnings * * *' to '*reconsider its previous modification of its original order and return petitioner's downtown fares to the original level of 8¢. This will serve the national program to keep down the cost of living.*'"

Then followed the Interstate Commerce Commission order of August 3, 1943 which allowed the prayer of the supplemental petition of the carrier. Thereafter, the municipal plaintiff filed its bill of complaint in this Court

with Fred M. Vinson, Economic Stabilization Director, intervening as a co-plaintiff. After that, the Interstate Commerce Commission, of its own motion, held a supplemental hearing which it confined solely to the practicability of the nine cent fare. At that hearing both the intervener plaintiff and the municipal plaintiff, attempted to present evidence relating to the 1943 earnings of the carrier for the purpose of showing that under such earnings no increase in fare whatsoever was justified. This offer was rejected by the examiner for the Commission. Both plaintiffs objected to such limitation of the scope of the hearing. In addition, cross-examination of a carrier witness by the plaintiffs as to a $240,000 charge for expenses alleged by the carrier and called War Damage Reserve, was refused by the examiner although it was strenuously suggested that such item was no longer acceptable, at least for any such amount. Thereafter the intervener plaintiff petitioned the Commission to modify its order of September 18, 1943 which limited the scope of the further hearing and to permit testimony of the earnings of the carrier since the original closing of the record, alleging that the record as it then stood was stale and did not reflect the true picture. The municipal plaintiff informally joined in that application by letter. The Commission, in its opinion of November 3, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."

Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. It actually considered the proposed evidence and decided that, despite it, its decision should stand. The municipal plaintiff and the intervener, by that evidence, offered to show that the carrier's rise in

business and net earnings had completely removed any reason for an increase over the eight cent fare. In refusing to consider such testimony which, under the terms of its tender went to the heart of the controversy, in our judgment the Commission did act arbitrarily and contrary to the mandate of its statute. As Mr. Chief Justice Hughes said in Atchison, Topeka & Santa Fe Railway Co. *vs.* United States, 284 U. S. 248, at page 262:

> "We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

In that case, which seems very much in point here, the Court also said, speaking as to the function of the Interstate Commerce Commission in such circumstances, page 262:

> "In the discharge of its duty, a fair hearing is a fundamental requirement. Interstate Commerce Comm. *vs.* Louisville & Nashville R. Co., 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied."

We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above. Starting with the intervener's answe on July 19, 1943 to the carrier's supplemental petition, these plaintiffs have ever since that time, been specifically requesting the Commission to reconsider its increase in fare order, in view of the carrier's tremendously improved current earnings. The intervener did it formally in its answer above referred to. Both plaintiffs strenuously urged it at the supplemental hearing and thereafter by the petition above referred to in which the Commission was requested to broaden the scope of its supplemental hearing so as to include evidence as to the carrier's 1943 earnings. The Commission order of November 2, 1943 definitely decided

that such new evidence would not be admitted. That order permitted the carrier to file and make effective the new tariffs on fifteen days notice. The Commission took the position that it was without power to further suspend the tariffs. In reality, therefore, both plaintiffs had exhausted their remedy before the Commission. In connection with this, the language of the order of June 8th above quoted, permitted any party of the proceeding to bring any changed conditions resulting in a different revenue situation to the attention of the Commission for a further hearing.

In passing, we do not see either under the I. C. C. statute or the relevant decisions that any request for rehearing is actually required prior to suit in this Court. In Baltimore & Ohio Railroad Co. *vs.* U. S., 298 U. S. 347, the United States Supreme Court held at page 371:

> "No Act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the commission prescribing rates or divisions."

By the language of its order of November 2, 1943, the Commission indicates plainly that it had actually passed upon and rejected the offer of the plaintiffs to present the 1943 earnings of the carrier in an effort to show that any increase in fare under the true present facts was not justified. In such situation the remedy of the plaintiffs before the Commission was exhausted; with the plaintiffs, if they wished to pursue the matter further, having no recourse but to come to this Court under the statute.

Economic Stabilization

We do not see that this phase of the case can be lightly brushed aside. Under present conditions, we doubt if its importance can be readily overestimated. Were these orders issued in violation of the national emergency policy of economic stabilization? The Commission said in its order of June 8, 1943:

> "It seems to us that an increase of 1 cent in respondents's downtown fare is unlikely to have any inflation-

> ary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

By that language, the Commission undoubtedly realized that the problem of inflation of the cost of living was involved in this particular rate increase. The Commission, without even considering the substantial proportionate increase as to the total fare, which amounts to approximately thirteen per cent, but simply having in mind the small amount in money the increase meant to each passenger taken alone, dismissed this phase of the matter as negligible. We do not see that there was ever any claim by the Director of Economic Stabilization that the raise in rates here by and of itself, would result directly in inflation. The gauge urged on behalf of Director Vinson was that set out in U. S. Gypsum Co. *vs.* Brown, 137 F. 2d, 360, where the United States Emergency Court of Appeals, speaking through Chief Judge Maris said at page 364:

> "The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral. See Lincoln Sav. Bank *v.* Brown, 137 F. 2d 228."

In the case of Philadelphia Coke Company *vs.* Chester Bowles, U. S. Emergency Court of Appeals, December 15, 1943, not yet officially reported, the Court said:

> "In a complicated economy such as ours the phenomena of price increases are the result of a complex of causes, the interaction of many economic forces. When inflationary pressure is one of the major forces operating in the economy it is wholly unrealistic to consider the price of a single commodity as in an economic vacuum and say that no threat of an inflationary increase can be discovered. Each commodity price must then be

considered in the light of the fact that it forms an integral part of the whole price structure."

For the Interstate Commerce Commission to permit the Director to intervene is not enough under the relevant statutes, orders and directives with reference to price stabilization. It is, of course, true that the Price Administrator does not have the authority to regulate carrier rates nor is such authority claimed here by the intervener but it is apparent that the executive orders issued with reference to stabilization do furnish a basic guide for all government agencies concerned, including the Interstate Commerce Commission. The President's Executive Order No. 9250, issued October 3, 1942, reads in part:

"The guidance policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942;"

The President's Order of April 8, 1943, No. 9328 reads:

"'The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program:"

It does seem from these that the Commission here is under a distinct duty in this particular case to give full effect to war time conditions and the stabilization legislation. It seems further, that in characterizing the allowed increase to this carrier as negligible and not directly causing inflation, that the Commission has failed to consider the dangerous, cumulative effect of the present allowed increase in connection with all the other cumulative sources of inflation, perhaps small in themselves, but tending collec-

tively to defeat the vital policy of controlling inflation as indicated in the above referred to Executive Orders of the President and the Act of October 2, 1942.

In view of the conclusions we have reached, there is no necessity for discussing the other points raised by the plaintiff and intervener. A permanent injunction will issue against the Interstate Commerce Commission as to its orders of June 8, 1943 and November 2, 1943 with respect to the increase in fare on the carrier's downtown line as set out in said orders.

APPENDIX "B".

FAKE, District Judge, Dissenting:

This is not the first time the passenger rates of the Hudson & Manhattan Railroad Company have been considered by this court. The company filed a local passenger tariff to become effective September 1, 1937, providing for a ten cent fare on its downtown line. This led to protests and extended hearings resulting in the establishment of a rate of eight cents by the Commission, two members thereof dissenting because they believed the ten cent fare to be justified. Resort was then had to this court resulting in the sustaining of the eight cent rate so established. The opinion of this court on the subject is found in Hudson & Manhattan Railroad Company *v.* U. S., 33 Fed. Supp. 495, affirmed, 313 U. S. 98. Therefore, the issues now before us do not come without some knowledge of the prior record.

I agree with the prevailing opinion that the dispositive issues here arise on the question of arbitrary action by the Commission in refusing to receive and consider evidence offered by the Price Administrator and the City of Jersey City on September 28, 1943. An examination of the proffered evidence discloses on its face that it transcends the limitations placed on the receipt of evidence by the Commission in its reopening order of September 18, 1943.

In this connection it is found on looking back over the record that an eight cent fare as established in 1938 has continued in actual operation down to the present time. On

June 27, 1942, the Railroad Company petitioned the Commission for a further hearing and again sought authority to charge ten cents on its downtown line. Replies were filed to this petition by the City of Jersey City and divers others, and on July 13, 1942, the Commission issued an order opening the proceedings. Commencing on September 9, 1942, and running through September 19, 1942, hearings were held bearing upon the issues involved on the petition and replies. On September 17, 1942, the Price Administrator entered an appearance on the record and reserved the right to be heard and to file a brief. His representative was then asked whether he desired to introduce any evidence and his answer was "Not at this time." On November 13, 1942, the Commission issued an order permitting the Price Administrator to intervene. Sometime during January or February, 1943, a proposed report by the Commission was issued.

On March 8, 1943, exceptions to the proposed report were filed by the Price Administrator and also by the City of Jersey City and six other municipalities and divers bus lines. On March 18, 1943, the Railroad Company filed a reply to the exceptions. On April 20, 1943, a stipulation to supplement and bring the record up to date was filed showing the total patronage and revenue of the Railroad Company for the months of January and February, 1943, and on that date oral argument covering all the issues then pending took place before the Commission. On June 8, 1943, the Commission filed a report and order establishing a nine cent fare on the downtown line, three of the Commissioners however maintaining the view that a flat fare of ten cents was reasonable.

On July 8, 1943, the Railroad Company filed a petition for reconsideration and modification of the Commission's order of June 8, 1943, on the ground that mechanical difficulties prevented its operation. On July 14, 1943, the City of Jersey City, *et als.*, filed a reply to the Railroad Company's petition. On July 19, 1943, the Price Administrator filed a reply.

The petition of the Railroad Company last above mentioned and the replies thereto raised certain issues bearing

on difficulties confronting the Railroad Company in the matter of the collection of the nine cent fare, and the Commission found that by reason of the peculiar construction and operation of the mechanical fare-collecting devices, nine cents, however divided, could not be received and properly counted in these devices; that other means of collecting that sum were impractical because in each instance they would result in unreasonable expense to the Railroad Company and involve serious delays in the discharge of its passengers. The evidence shows clearly that speedy discharge of passengers is of prime importance because the schedules of the connecting railroads are arranged to prevent traffic congestion. For these, and other reasons, the Commission entered its order of August 3, 1943, modifying its order of June 8, 1943, permitting a fare of one dime or the use of eleven tokens at $1.00 for eleven rides on both the uptown and downtown lines. This afforded the uptown passengers a fare of 9-1/11¢ where under the prior order of June 8, 1943, they were to pay ten cents and would cause the downtown passengers to pay 9-1/11¢ where under the prior order they were to pay nine cents. In this connection it seems to me the Commission functioned fully within its lawful sphere of action, and down to this point I am not able to find even the slightest question of arbitrary action. There was ample evidence before the Commission to bring their action within the rule laid down by the decision of the United States Supreme Court above cited, and in this connection it was not then and is not now within the province of this court to weigh the testimony and form a conclusion in conflict with the Commission's findings of fact. The Commission must be sustained whenever it appears that "there was evidence to support the Commission's findings." Such were the words of the Supreme Court.

On September 13, 1943, the City of Jersey City filed its complaint in this court and the Price Administrator was subsequently permitted to intervene in this action.

On September 18, 1943, the Commission entered its order reopening the proceedings, limiting the same as follows: "for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawful-

ness of the modifications made by the Commission in its report of August 3, 1943 * * * that at such further hearing any party hereto shall have the right to cross-examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission." All of which clearly discloses the intent of the Commission to consider all issues closed save only the one specifically referred to.

Thereafter on September 28, 1943, and of course after the institution of the suit here, the representatives of the City of Jersey City and of the Price Administrator attempted to introduce evidence bearing upon the earnings of the carrier for the first six months of the year 1943, for the purpose of showing that there was no justification for the increased fare allowed either under the order of June 8, 1943, or the order of August 3, 1943, and that the action of the Commission was inflationary. Also it was sought to cross-examine witnesses who had appeared at prior hearings and testified in relation to a $240,000 charge made by the Railroad Company for war damage reserve. It is my view that when by stipulation as hereinbefore appears, evidence was introduced bearing upon the earnings for the months of January and February, 1943, this made the evidence reasonably current and timely. However, here the Commission functioned with open eyes within their discretionary powers and this court cannot usurp their functions on the question of reasonable time as applied to the timeliness of the record. Rate making is a highly specialized art. The Commissioners had evidence on the subject before them and listened to arguments on that point and we should not substitute our judgment for their's. Prior to June 8, 1943, the Commission had given full opportunity for the introduction of evidence and arguments were heard bearing upon the $240,000 item. As to the proffered new evidence, the Commission said in its report of November 2, 1943, "* * * we have no reason to believe that, if the

additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report."

Of course the flow of economic change never stops—always and forever the comings and goings and doings of man have their effect in preventing a static period at which time the Commission might stop and make a decision. Always the point of termination must be fixed in the midst of fluctuations in the economic factors involved. It is my view that this court should not enter the province of the Commission in considering the subject of inflation. They were charged with the duty of passing on it by reason of the executive order on that subject and dealing as they do from day to day with economic factors, they constantly are kept advised in that field, and I believe their action here resulted from close attention to all the factors involved including inflation.

A careful study of the record convinces me that there was ample evidence to sustain the validity of each of the rulings made by the Commission herein and I am therefore unable to concur in the prevailing opinion.

APPENDIX "C".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants*.

Findings of Fact and Conclusions of Law.

Before McLaughlin, Circuit Judge and Fake and Meaney, District Judges.

FINDINGS OF FACT.

1. This action was brought by the City of Jersey City, New Jersey and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, against the United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, for the purpose of setting aside, annulling and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943 in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. --).

2. Plaintiff is a municipal corporation in the County of Hudson, State of New Jersey and is a body politic.

3. The intervener plaintiff is the agency designated by the President to receive notice of any increase in the rates

or charges of common carriers or other public utilities, pursuant to the Emergency Price Control Act of January 30, 1942, as amended October 2, 1942 (Public Laws 421 and 729, 77th Congress, 2nd Session); with authority to intervene and participate in proceedings before Federal, State and municipal authorities in connection with proposed increases in such rates and charges.

4. The defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

5. The defendant, Interstate Commerce Commission, is an administrative commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

6. The defendant, Hudson & Manhattan Railroad Company, is a consolidated corporation organized and existing under and pursuant to the laws of the States of New York and New Jersey, having a residence and its statutory office in the District of New Jersey.

7. The matters covered by the aforesaid orders of the Commission relate to transportation and arose in part in the District of New Jersey. This Court has jurisdiction.

8. Defendant, Hudson & Manhattan Railroad Company is a common carrier by railroad engaged in the transportation of passengers in interstate commerce, and is subject to the provisions of the Interstate Commerce Act, United States Code, Title 49, Chapter I, part I. It transports no baggage, freight or express matters.

9. The defendant, Hudson & Manhattan Railroad's property consists of an underground rapid transit passenger railway, operated exclusively by electric power of the three rail type, and furnishing transportation facilities between points in Jersey City and Hoboken, New Jersey and downtown and uptown New York City. On its downtown line, this defendant's trains operate between (a) the Jersey City, New Jersey stations of Exchange Place, Grove

and Henderson Streets and Journal Square, and said defendant's downtown terminal at Hudson Terminal, New York City and (b) between the Jersey City, New Jersey stations at Exchange Place and Erie Stations and Hoboken, New Jersey and the said downtown terminal at Hudson Terminal. On its uptown line the trains operate (a) between the Hoboken, New Jersey station and the uptown New York City stations of Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street and (b) between the Jersey City, New Jersey stations of Journal Square, Grove and Henderson Streets and Erie Station and the said uptown New York City stations located at Christopher Street, 9th Street, 14th Street, 19th Street, 23rd Street and 33rd Street.

10. The defendant railroad also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between its downtown terminal at Hudson Terminal, New York and the station of the Pennsylvania Railroad at Market Street, Newark, New Jersey. The trains in this joint service operate over the lines of the defendant railroad between its downtown terminal, Hudson Terminal at New York City and the Journal Square Station, Jersey City and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Market Street, Newark, New Jersey.

11. On July 31, 1937, the railroad issued, published and filed, with the Commission, its local passenger tariff designated as I. C. C. No. 42, to become effective September 1, 1937, providing for the establishment of a fare of ten cents for the interstate transportation of passengers on the railroad's downtown line as aforesaid, in lieu of a fare of six cents previously published and maintained in force and effect. Said tariff provided for no changes in the fare then in effect for interstate transportation on the uptown line previously and then established at ten cents.

As a result of protests filed by plaintiff, Jersey City, and others in New Jersey, the effectiveness of the aforesaid tariff was suspended and the lawfulness of the proposed increase in the downtown fare was made the subject matter

of a proceeding instituted by the Interstate Commerce Commission in Investigation and Suspension Docket No. 4394.

12. After due hearing the Commission on July 11, 1938, found, 227 I. C. C. 741, that the proposed increase from six cents to ten cents in the passenger fare maintained by the railroad on its downtown line had not been justified, but that an eight cent fare had been justified. A fare of eight cents on the downtown line became effective July 25, 1938, and has since been maintained. The Commission in its original report and order, 227 I. C. C. 741, found:

(1) "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service, the reasonable fare for the downtown service must be something less than ten cents." 227 I. C. C. 741, 754.

(2) "If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic." 227 I. C. C. 741, 762.

(3) "The proposed fare of ten cents would be unreasonable under the Act and has not been justified." 227 I. C. C. 741, 762.

13. Following the promulgation of the report and order of July 11, 1938, 227 I. C. C. 741, as aforesaid, the railroad company appealed to the courts to enjoin the same. It filed its bill in the Southern District of New York seeking to enjoin the order of the Commission, but said action was dismissed by the District Court of the Southern District of New York because of improper venue, the court holding that proper venue was in the District of New Jersey, Hudson & M. R. Co. *vs.* U. S., 28 Fed. Supp. 137. Thereupon the railroad company filed its bill in the United States District Court for the District of New Jersey. The order of the Commission accompanying the original report was upheld by the United States District Court for the District of New Jersey, Hudson & M. R. C. *v.* United States, 33 Fed. Supp.

495, which was affirmed by the Supreme Court, Hudson & Manhattan R. Co. *v.* U. S., 313 U. S. 98.

14. Upon petition of the defendant railroad of July 27, 1942, for further hearing and for leave to publish and charge a ten cent fare on its downtown line by reason of alleged changed conditions, the proceeding was reopened for further hearing by the Interstate Commerce Commission. On November 9, 1942, notice was served upon the plaintiff intervener of such proceeding and his timely intervention in such proceeding was consented to. Such further hearing was held and as a result thereof the Commission issued its decision on June 8, 1943, 255 I. C. C. 649, affirming its original conclusion that the proposed fare of ten cents would be unjust and unreasonable and has not been justified. The Commission further concluded that an increased local fare of nine cents on the railroad's downtown line had been justified for application during the remaining period of the war and six months after its termination.

15. In promulgating its report and order of June 8, 1943, as aforesaid, the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached."

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in Increased Railway Rates, Fares and Charges, 1942, supra, the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

(3) "While there can be little doubt that under present conditions further increase in this (eight-cent) fare, even to ten cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that

a substantial portion thereof should be sought through increased divisions on the interline traffic."

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an eight-cent or a nine-cent fare than for a ten-cent fare on the downtown line of respondent."

16. The railroad on July 8, 1943, filed a petition for reconsideration and modification of the findings made by the Commission in its report on further hearing, dated June 8, 1943. That petition sought, through the medium of an affidavit attached thereto and made a part thereof, to secure modification of the Commission's order because of an alleged disability on the part of the railroad to collect the nine-cent fare on the downtown line with its available fare collection system. By this petition the railroad sought, pending the procurement of tokens which were to be sold at eleven for one dollar with an alternative cash fare of one dime, that it be authorized to charge, on the downtown line, a cash fare of ten cents. Such cash fare of ten cents was to continue in effect indefinitely until necessary tokens were acquired and alterations were made in the fare-collection boxes. In connection therewith, the railroad proposed that if its request were granted it would reduce the fare on the uptown line from ten cents per passenger to eleven tokens for one dollar, with an alternative cash fare payable only by a dime.

17. The plaintiff, Jersey City, on July 14, 1943, answered the railroad's petition and in requesting denial thereof prayed that if any affirmative action be taken by the Commission, the proceeding be set for further hearing to give all parties their requisite day in Court on the new matters therein alleged and thereby afford the plaintiff its right of cross examination. The plaintiff intervener filed his answer to the railroad's supplemental petition on July 19, 1943. He opposed the proposed modification in rates on the ground that such modification would result in addi-

tional inflation, and he requested that the Commission reconsider its June 8th order and restore the downtown fare to the eight cent level, stating:

> "In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."

18. On August 3, 1943, upon the facts as aforesaid, without according the plaintiffs further hearing, the Commission issued its report on reconsideration. Such report affirmed the prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but permitted an increased local fare on the downtown line based on the alternative basis of eleven tokens for one dollar or a cash fare of ten cents, payable by a dime. Such permissive increase was coupled with the proviso that contemporaneously with the establishment and maintenance of the increased downtown fare the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents, payable by a dime, be established and maintained on interstate traffic on the uptown line.

19. In so providing for increased fares on the downtown line whereby the regular patron or so-called commutation passenger would be required to pay nine and one-eleventh cents per ride, and the occasional rider ten cents per ride in lieu of the nine-cent fare theretofore found to be the reasonable maximum figure, the Commission in its report and order of August 3, 1943, stated:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons herein stated,

should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate."

In the original report and order of the Commission made July 11, 1938, 227 I. C. C. 471, the Commission found that if the railroad "should feel impelled to seek a further increase in revenue (over and above an eight-cent downtown fare therein prescribed) it should consider doing so on interline traffic." The Commission's decision containing such admonition was upheld by the District Court for the District of New Jersey, Hudson & M. R. Co. *v.* U. S., supra, and affirmed by the Supreme Court of the United States, Hudson & Manhattan R. Co. *v.* U. S., supra. A similar directive to the railroad to increase its revenue through an adjustment of its interline division with the Pennsylvania Railroad appeared in the Commission's report and order of June 8, 1943, 255 I. C. C. 649 and again in its report and order of August 3, 1943.

20. On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, having for its purpose the enjoining of the report and order of August 3, 1943. Application was made, upon filing said bill, for a temporary restraint against putting into effect said order and a statutory court was duly established to hear said application.

21. On its own motion, by order dated September 18, 1943, and prior to hearing of the application for a temporary restraint, the Interstate Commerce Commission reopened the instant proceeding for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943;" and to afford "any party hereto * * * the right to cross examine adverse witnesses."

22. Both the plaintiff and the intervener plaintiff excepted to the restrictions and limitations imposed by the

Commission's aforesaid order for supplemental hearing, insisting at the start of the hearing and repeatedly throughout the proceeding, that the hearing be broad enough to include evidence of the defendant railroad's revenues, expenses and earnings since the closing of the original hearing in the matter. Both plaintiffs excepted to the interpretation given by the trial examiner to the Commission's order of September 18th re-opening hearing in that he refused to receive any testimony with respect to the railroad revenue except testimony confined strictly to the difference in revenue resulting from the authorized cash fare and the combination cash and token fare. Both plaintiffs endeavored to submit proof that the railroad's patronage had been increased by amount in excess of thirty per cent in 1943 over 1941 and that no additional revenue was necessary or could be properly allowed in excess of the existing eight cent local downtown fare. This proffer was in accord with the decision of the Commission of June 8, 1943 reading:

> "Under present fares (eight cents on the local downtown line and ten cents on the uptown line) it would be necessary for its annual traffic to increase by about thirty per cent over that of 1941 in order to meet the current interest requirements on its bonded indebtedness."

That same order also stated:

> "It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

23. At that hearing of September 18, 1943, both plaintiffs sought to introduce in evidence a "Condensed Income Statement" of the defendant railroad covering the months of July 1942 and July 1943 and the first seven months of 1942 and 1943 respectively. That exhibit was

excluded from the record. It was contended it showed the repeatedly improving financial position of the railroad even after all of its alleged operating expenses and that at the existing eight cent fare the railroad is earning more than the Commission anticipated it would at the nine cent fare in its order of June 8, 1943. The contention was further made that the offered exhibit showed that an alleged expense of $20,000 a month of the carrier for self insurance cost was entirely unwarranted and should be eliminated and if it were, that the defendant railroad would earn at the existing eight cent fare far in excess of all interest charges, a condition not anticipated at the nine cent fare, by the Commission in said order.

24. Thereafter, on October 14, 1943, the intervener plaintiff filed with the Commission, a written motion for modification and amendment of its said order of September 18, 1943. In that motion, the municipal plaintiff joined by letter. The motion was based on the restrictive scope of the supplemental hearing of September 18, 1943 and requested the re-opening of the proceeding to permit the plaintiffs to introduce the evidence excluded by the examiner and such additional evidence as might be necessary in order to bring the record alleged to be obsolete and stale, down to date.

25. That motion was overruled by the Commission in its "Second Report on Further Hearing" issued November 2, 1943, wherein the Commission granted the petition of the Railroad to substitute token and cash fares on its downtown and uptown lines in lieu of theretofore authorized cash fares.

26. The Commission in its opinion of November 2, 1943 said concerning the offer to submit evidence of the carrier's 1943 earnings:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as

made in the second report * * * the motion will therefore be overruled."

27. The order of the Commission of November 2, 1943 permitted the railroad to file and make effective the new tariffs on fifteen days notice.

28. With reference to the economic stabilization and inflation branch of this case, the Commission in its order of June 8, 1943, which increased the downtown fare cash from eight cents to nine cents said:

> "It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible." (255 I. C. C. 649, 668.)

29. On November 18, 1943 an amended complaint was filed in this cause by the plaintiff, City of Jersey City. Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervened as a plaintiff by petition. The above facts were referred to in the amended complaint and the intervener's petition. The amended complaint of the plaintiff, City of Jersey City, prayed that upon final hearing of this cause that this Court order, adjudge and decree that the orders of the Commission dated June 8, 1943 and November 2, 1943, insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company, is, and at all times has been, beyond the lawful authority of said Commission, and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

Prayer was also had for a temporary injunction and restraint enjoining the defendants from so much of said orders of June 8, 1943 and November 2, 1943 as permits the establishment of any local interstate fare in excess of

eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener plaintiff prayed that pending the final hearing of this cause, the Court issue an interlocutory and permanent injunction and restraint enjoining the defendants from so much of said orders of June 8 and November 2, 1943, as permits the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company. The intervener also prayed that upon final hearing this Court adjudge, order and decree that said orders of June 8 and November 2, 1943, insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the Hudson & Manhattan Railroad Company, are, and have at all times been, in violation of the Stabilization Act of October 2, 1943 enacted by the Congress; and said orders are and have at all times been, beyond the lawful authority of said Commission and wholly null and void; and that said orders be perpetually set aside and annulled and the enforcement thereof perpetually enjoined.

30. The defendant, United States of America, filed a neutral answer. The defendants, Interstate Commerce Commission, and Hudson & Manhattan Railroad Comany, filed their respective answers to the amended complaints and the intervener's petition. Said answers in substance admitted the making of the orders of the Commission of June 8, 1943 and November 2, 1943, denied that the plaintiffs were not allowed a full and fair hearing, denied that said orders failed to give effect to the stabilization program and the efforts of the national government to cut down the cost of living and alleged that said orders were made after full hearing and consideration of proofs and arguments of all parties and that they are fully supported by the evidence before the Commission and by the Commission's findings based on such evidence. In addition, the defendant railroad in its answer and the defendant, Interstate Commerce Commission in its amended answer, alleged that the relief sought by the plaintiffs is premature, saying

that neither of the plaintiffs have exhausted the administrative remedies provided in cases of this kind and further, that both the plaintiffs are estopped from now questioning the reasonableness of the nine cent fare found reasonable by the Commission's report of June 8, 1943. They allege that the estoppal arises because neither of the plaintiffs has ever filed a petition with the Commission asking reargument or reconsideration of the order of June 8, 1943 although "Rule 101 of the General Rules and Practice of the Commission specifically provides for such petitions in connection with any decision or order of the Commission."

31. Following hearing on the application for an interlocutory injunction on November 26, 1943, this Court issued its findings and order restraining and enjoining the defendants, pending final hearing in this proceeding, from putting into effect the report and orders of the Interstate Commerce Commission of June 8, 1943 and of November 2, 1943 insofar as such orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the defendant, Hudson & Manhattan Railroad Company.

32. Final hearing was had in this cause on December 14, 1943.

Conclusions of Law.

1. Both the plaintiff, Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, are proper parties to bring and maintain this proceeding as plaintiffs herein.

2. The petition by the defendant carrier, Hudson & Manhattan Railroad Company, to the Interstate Commerce Commission of July 27, 1942 asking for a ten cent fare on its downtown line, was one for additional revenue and the orders of the Commission of June 8, 1943 and November 2, 1943 were based upon Section 15 (1) of the Interstate Commerce Commission statute which specifically provides for a full hearing.

3. Both the plaintiff, City of Jersey City, and the intervener plaintiff, Director of the Office of Economic Stabilization, properly appeared as protesting parties before the Interstate Commerce Commission and were and are entitled to a full and fair hearing by that Commission.

4. Both the plaintiff and the plaintiff intervener, were denied a full and fair hearing in that they were deprived of the right to cross examine witnesses and to present testimony on matters which have a substantial bearing upon the right of the Hudson & Manhattan Railroad Company to fares higher than fares charged on September 15, 1942.

5. That the Commission's said orders of June 8, 1943 and November 2, 1943 authorizing increases in fares failed to give effect to the economic stabilization program and efforts of the national government to keep down the cost of living, particularly in that the Commission erroneously assumed that said increases would not have any effect on the program to keep down the cost of living.

6. That both the plaintiff and the intervener plaintiff exhausted their administrative remedies before instituting this proceeding.

7. That the plaintiff, City of Jersey City, and the intervener plaintiff, Fred M. Vinson, Economic Stablization Director, by Chester Bowles, Price Administrator, are entitled to the setting aside and annulling of said orders of June 8, 1943 and November 2, 1943 and to a perpetual injunction against their enforcement insofar as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company.

8. That the plaintiff, City of Jersey City, and intervener plaintiff, Fred M. Vinson, Economic Stabilization Director, are not estopped from questioning the validity of the nine cent fare on the downtown line of the defendant, Hudson & Manhattan Railroad as authorized in the Commission's

order of June 8, 1943 or the further increases in said downtown fare authorized by the Commission's order of November 2, 1943.

A decree shall be entered herein accordingly.

_____,

United States Circuit Judge.

_____,

United States District Judge.

Newark, New Jersey, January 12, 1944.

APPENDIX "D".

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Civil Action No. 3073.

CITY OF JERSEY CITY, *Plaintiff*,

and

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Intervener-Plaintiff*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, *Defendants*.

Final Decree Granting Permanent Injunction.

This action coming on to be heard upon final hearing before a statutory court consisting of Honorable Gerald McLaughlin, Judge of the Circuit Court, and Honorable Guy L. Fake and Honorable Thomas F. Meaney, Judges of the District Court, in which action an amended complaint was filed by the City of Jersey City as plaintiff, against the United States of America, Interstate Commerce Commis-

sion and Hudson & Manhattan Railroad Company, defendants, for the purpose of setting aside, annulling, and perpetually enjoining, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28, U. S. C.), the rate order issued by Interstate Commerce Commission of June 8, 1943, in a matter titled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), in which action Fred M. Vinson, Director of the Office of Economic Stabilization, by Chester Bowles, Price Administrator of the Office of Price Administration, intervened, and filed his complaint as intervener plaintiff, in the presence of Charles Hershenstein, Charles A. Rooney, and S. S. Eisen, appearing for the plaintiff, City of Jersey City; Harry R. Booth, appearing for Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, intervener-plaintiff; John F. Finerty and John Buck, appearing for the Hudson & Manhattan Railroad Company, and E. M. Reidy, appearing for the Interstate Commerce Commission, defendants, and the court having examined the pleadings and the record before the Commission and having taken proofs orally in open court and having heard and considered the oral arguments of counsel and the briefs filed, from which good and sufficient cause appears that the City of Jersey City, plaintiff, and Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator of the Office of Price Administration, intervener-plaintiff are entitled to the relief prayed for, to wit, the setting aside and annulling of said orders of June 8, 1943 and November 2, 1943, and to a perpetual injunction against enforcement so far as they permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and the Court having filed its opinion and findings of fact and conclusions of law; and upon all the pleadings and proceedings heretofore had herein;

It is, on this 14th day of January, 1944, ORDERED, ADJUDGED and DECREED, that the rate order issued by Interstate Com-

merce Commission of June 8, 1943, in a matter entitled "Investigation and Suspension Docket No. 4394, Passenger Fares of Hudson & Manhattan Railroad Company" (255 I. C. C. 649) and a supplemental order issued therein on November 2, 1943 (256 I. C. C. —), so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of the said defendant, Hudson & Manhattan Railroad Company, are hereby set aside, annulled, and perpetually enjoined, pursuant to Sections 41 (28) and 47 of the Judicial Code (Title 28 U. S. C.); and

It is FURTHER ORDERED, ADJUDGED and DECREED, that the defendants, United States of America, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, their agents, representatives, employees and servants, be and they hereby are permanently enjoined and restrained from enforcing and putting into force and effect said orders of the Interstate Commerce Commission bearing date June 8, 1943 and November 2, 1943, hereinabove more particularly referred to, so far as said orders permit the establishment of any local interstate fare in excess of eight cents for transportation on the downtown line of said defendant, Hudson & Manhattan Railroad Company; and

It is further ORDERED, ADJUDGED and DECREED, that the proceedings are hereby remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the court filed herein.

GERALD MCLAUGHLIN,
United States Circuit Court Judge.
THOMAS J. MEANEY,
United States District Court Judge.

INDEX

	Page
OPINIONS BELOW	1–2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2–4
STATEMENT	4–26
SUMMARY OF ARGUMENT	26–29
ARGUMENT	30–61
I. The Commission did not err in refusing, after having one full hearing upon which it authorized an increase in passenger fares, to reopen the proceeding on all issues	30–50
II. The Commission did not disregard the provisions of the Inflation Act of October 2, 1942	50–59
III. The increase authorized by the Commission was supported by the evidence	59–61
CONCLUSION	61
MAP	62
APPENDIX A (The Statute)	63–70
APPENDIX B (Summary of Evidence)	71–82

CASES CITED

Acker v. *United States*, 298 U. S. 426	47
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248	39, 40
Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349	40
Davies Warehouse Co. v. *Bowles*, No. 112, October Term, 1943 (Unreported)	45, 46
Florida v. *United States*, 282 U. S. 194	39
Hecht Co. v. *Bowles*, No. 316, decided Feb. 28, 1944 (Unreported)	56
Hudson & Manhattan R. Co. v. *Cahill*, 307 U. S. 640	4
Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98	2, 4, 7, 29, 59
Illinois Commission v. *United States*, 292 U. S. 474	40
Increased Rates, Fares, and Charges, 1942, 248 I. C. C. 545	57
Increases in Texas Rates, Fares, and Charges, 253 I. C. C. 723	51

	Page
Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541	29
Local Fares on Hudson & Manhattan Railroad, 58 I. C. C. 270	5
New England Divisions Case, 261 U. S. 184	30, 50
Passenger Fares of Hudson & Manhattan R. Co., 255 I. C. C. 649; 256 I. C. C. 507; 227 I. C. C. 741	1, 4
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38	40
Texas & Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197	52
United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490	38, 39, 40, 59
Vinson v. *Washington Gas Light Co.*, No. 396, decided March 27, 1944 (Unreported)	28, 29, 43, 59

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

CITY OF JERSEY CITY AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANT, INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 194) is unreported. The two reports of the Commission which have been enjoined by the lower court are its reports of June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272) in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan R. Co.* Other Commission reports involved are its decisions in

the same proceeding dated July 11, 1938,[1] 227 I. C. C. 741 (R. 286), and August 3, 1943, 256 I. C. C. 269 (R. 313).

JURISDICTION

The final decree of the District Court was entered on January 14, 1944 (R. 218). Petition for appeal was filed February 9, 1944 (R. 220), and was allowed the same day (R. 234). Probable jurisdiction was noted on April 3, 1944 (R. 433). Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C., sections 45, 47a.

STATUTES INVOLVED

Pertinent provisions of the statutes involved are set forth in the Appendix, infra, pp. 63–70.

QUESTIONS PRESENTED

1. In allowing the Hudson & Manhattan Railroad Company to meet increased costs by granting an increase in passenger fares on its downtown line from 8 cents to 9 cents, and subsequently to $9\frac{1}{11}$ cents (11 tokens for a dollar) or 10 cents

[1] Sustained by this Court in *Hudson & Manhattan R. Co.* v. *United States*, 318 U. S. 98.

in cash for the passenger preferring to proffer a single fare, which increase was accompanied by a decrease from 10 cents cash to $9\frac{1}{11}$ cents (11 tokens for a dollar) or 10 cents in cash for operations on the uptown line of the carrier, did the Commission, in the absence of any offer of evidence to show the inflationary effect of such modest increase, give proper weight to the provisions of the Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 et seq.), and the Inflation Control Act (Stabilization Act) of 1942 (Act October 2, 1942, Title 50, U. S. C., Secs. 961 et seq.)?

2. Where the Commission, after full hearing and based upon substantial evidence, granted an increase in passenger fares from 8 cents to 9 cents, sought by the Hudson & Manhattan Railroad Company, and where it was subsequently shown that the company, due to limitations in the mechanism of its fare collection boxes, was unable to collect this increased fare consisting of five coins, could the Commission, in reopening the proceeding, limit the rehearing to evidence concerning the alleged disabilities of the fare collection boxes, or was it necessary for the Commission to reopen the entire case and consider anew the propriety of the increase?

3. Was the Commission's order of June 8, 1943, permitting an increase in the passenger fares of the Hudson & Manhattan from 8 cents to 9 cents, and

its order of November 2, 1943, permitting, after further hearings, a modification in its prior order so as to allow the carrier to charge 11 token for a dollar, applicable on both its uptown and downtown lines (or 10 cents cash for the "occasional" passenger) supported by substantial evidence?

STATEMENT

In I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan Railroad Company*, 227 I. C. C. 741, decided July 11, 1938, the Commission permitted that carrier to increase its passenger fares between Hudson Terminal and stations in Jersey City and Hoboken, known as its downtown line, from 6 cents to 8 cents.[2] This order was sustained by this court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98. The report in that case, also in the record here (R. 286) contains a description of the properties of the Hudson & Manhattan, briefly referred to as follows:

Appellant's lines consist of an underground rapid-transit system, operated by electric power of the three-rail type, transporting passengers between stations on Manhattan Island [3] and stations in Jersey City and Hoboken (R. 287). It does not

[2] A map of appellant's properties appears at p. 12 of this brief.

[3] Appellant's properties are also described in a case arising under the Railway Labor Act, reported in *Hudson & Manhattan R. Co.* v. *Cahill*, 22 F. Supp. 105, reversed 103 F. (2d) 327, certiorari denied, 307 U. S. 640.

handle package, freight, or express matter (R. 287). It has two double-track lines under the Hudson River, known as the downtown and uptown lines, connecting on the New Jersey side and comprising in all about 8.5 miles of line, of which all but 0.63 mile is underground (R. 287).

The downtown line,[4] which crosses under the river by two parallel tunnels between Exchange Place, Jersey City, and Hudson Terminal, New York, extends westwardly in Jersey City from Exchange Place through a station at Grove and Henderson Streets to Journal Square, where connection is made with the Pennsylvania Railroad (R. 287).

The uptown line[4] crosses under the Hudson River by two parallel tunnels from Hoboken to Christopher Street, New York, from which point it runs uptown under Sixth Avenue to a terminal at Thirty-Third Street (R. 287). The uptown and downtown lines connect on the New Jersey side by means of a north-and-south line paralleling the Hudson River, extending from a junction with the uptown line near Hoboken (R. 287). Appellant has stations in the terminals of the D. L. & W. R. R. Co. at Hoboken, the Erie R. R. at Jersey City, and the

[4] The Commission had in 1920 permitted an increase from 7 cents to 10 cents for interstate transportation on the uptown line. At the same time the interstate fare on the downtown line had been increased from 5 to 6 cents (*Local Fares on Hudson & Manhattan R. R.*, 58 I. C. C. 270).

Pennsylvania Railroad at Exchange Place (R. 287–8). In conjunction with the Pennsylvania Railroad, it also operates a joint rapid transit service between Hudson Terminal and Newark, over appellant's line to Journal Square, thence over the Pennsylvania through Harrison to Market Streets, Newark (R. 288). Passengers on these trains may transfer to or from the uptown line, where it connects with the downtown line in Jersey City (R. 288).

The 8-cent fare became effective on July 25, 1938, and has since been maintained (R. 220). Following the outbreak of the present war, and alleging changed conditions and increased costs as a result thereof, the carrier on June 27, 1942, filed a petition for further hearing and asking for leave to publish and charge a 10-cent fare (R. 249, 390). Protests against the increase were filed by the City of Jersey City (R. 404) and by the Hudson Bus Corporation. Thereafter the proceeding was reopened and testimony introduced before a Commission examiner in September 1942, covering a period of 7 days, and 919 typewritten pages of testimony.[5] In addition a large number of exhibits were presented and received.[6]

[5] This typewritten transcript and exhibits have not been printed but pursuant to stipulation of the parties, have been sent up as an original exhibit (R. 419), with leave to either side to refer to such transcript in brief and oral argument. Pages 1 to 1010, inclusive, of the transcript consists of the earlier hearing by the Commission, result-

During the course of this hearing, an attorney for the Price Administrator entered his appearance (O. R. U., September 17, 1942, pp. 1556–1557). He stated "The purpose of the appearance is to reserve the right for the Office of Price Administration to move, in connection with any of these hearings, and to file appropriate briefs in due time." He further stated (same record reference) that it was not his intention to offer any evidence at that time. Nor was any effort made by him during the course of the hearing, which concluded on September 19, 1942, to introduce any testimony. The Emergency Price Control Act of 1942 was passed Jan. 30, 1942 (56 Stat. 23). The Inflation Act of 1942 was passed October 2, 1942, c. 578, 56 Stat. 765, and contained a proviso that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

---

ing in its order of July 11, 1938 (R. 286), which was sustained by this court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98. Reference to the printed transcript will be made as (R. —) and to original record, unprinted, but lodged with the clerk as (O. R. U. —).

By order of November 13, 1942, the Commission acted favorably upon a request of the Office of Price Administration that it be permitted to file a brief (R. 311), which was in fact filed on December 14, 1942. It was urged therein that an increase in the fare on the downtown line of the Hudson & Manhattan Railroad Company was not justified by present conditions and to grant the increase would run counter to the Government's program to prevent inflation and to stabilize the cost of living. On January 25, 1943, the Commission examiner who heard the case issued a proposed report, recommending that the Commission find the applied-for rate of 10 cents on the downtown line to be just and reasonable. Exceptions to this report were filed by the City of Jersey City and the Price Administrator (R. 365), and the Administrator, at page 20 of his exceptions (filed March 8, 1943) said:

> * * * We did not nor do we now, suggest that this proposed increase in fare [from 8 to 10 cents] will in and of itself result in inflation. Such a suggestion would, of course, be asinine. * * * (R. 378.)

There was no claim in either of the exceptions that a full and fair hearing was not granted. The proceeding was argued before the entire Commission on April 20, 1943, by counsel for the carrier, Jersey City, and the Price Administrator. At that time a stipulation was

entered into between the parties to bring the record in certain respects up to date.*

At the April 20, 1943, oral argument, counsel for the Administrator did not contend that conditions had changed, on the contrary he opened his argument as follows (O. R. U., p. 2008):

> If the Commission please. I think it has been clearly demonstrated that there has been no change of conditions since this Commission's determination that the rate for this service, that a fair and reasonable rate is 8 cents, which warrants a 10-cent fare at this time."

The proceeding was decided by the entire Commission on June 8, 1943 (255 I. C. C. 649), at

---

*The stipulation referred to, dated April 20, 1943, (R. 410) provides that:

"*Whereas* the hearings and taking of testimony in the captioned proceeding were concluded on September 19, 1942; and

Whereas the parties hereto have agreed to supplement or otherwise bring the record up to date to the extent of showing the total patronage and revenues of the Hudson & Manhattan Railroad for the months of January and February, 1943,

Now therefore the parties hereto stipulate that the following Hudson & Manhattan Railroad figures and revenues should be incorporated into the record and made a part hereof:

	Total number passengers	Total revenue
January 1943	7,012,492	$577,342.66
February 1943	6,591,481	$543,554.36"

which time the Commission made the following findings:

> * * * Respondent's annual operating costs have increased since 1937 by about $671,500 and since 1941 by about $466,500, including the war contingency reserve of $240,000 a year for protection against extraordinary war hazards, which we may accept as reasonable, * * *. Taking into account those increased operating costs, together with the augmented traffic and revenues since the beginning of the war, we must next determine the probable future revenue results on respondent's lines under the present and the proposed fares. (R. 267.).
>
> * * * * *
>
> Economic and competitive conditions affecting respondent's traffic have, of course, changed materially since the prior decision, and a downtown fare of more than 8 cents would not now have as serious an effect in traffic diversion as would have been true in 1938. (R. 268.)
>
> * * * * *
>
> The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest on its bonds. This it should be permitted to do if it can be done without casting an undue burden upon any particular traffic. (R. 269.)
>
> * * * * *

It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

(R. 270.)

Based upon the foregoing facts, we find that in order to meet increased operating expenses and the interest on its bonds, respondent is in need of additional revenue beyond that which may be expected from its present fares and divisions, and that a portion of such additional revenue can reasonably, and should be obtained by increasing its downtown fare from 8 to 9 cents.

(R. 271.)

* * * * *

* * * the increased fare should remain in effect for no longer than the duration of the war and six months thereafter. It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to

bring the facts with respect thereto to our attention at a further hearing.

(R. 271.)

* * * * *

* * * We further conclude that an increased local fare of 9 cents on respondent's downtown line has been justified, for application during the remaining period of the war and six months after its termination.

(R. 271.)

Following the rendition of this decision by the Commission, the carrier found that it could not avail itself of the increase allowed because of mechanical limitations in its fare collection boxes, so on July 8, 1943, it filed with the Commission a petition asking the right to charge a 10-cent fare until it could secure tokens, and also to remove the limitation that the fares were to expire six months after the war. (R. 327–336.) Jersey City's answer to this petition concluded:

It is the position of protestants that the petition should be denied, that the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by respondent, [the mechanism of its fare boxes] that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied.

(R. 350.)

There was no claim of stale record made. On July 14, 1943, the Price Administrator filed his reply to the carrier's petition. Instead of attacking the increase to 9 cents, he advocated what he called a feasible scheme through the use of paper tickets to collect the 9 cents (Page 9 of O. P. A. reply to petition filed July 14, 1943) (R. 357). In conclusion, the Price Administrator asked that the fares go back to 8 cents in view of alleged increased earnings, and said (R. 364): "In any event, before the fares are increased on the basis suggested by the Company [a cash fare of 10 cents or an alternative fare of 11 tokens for a dollar] a further hearing should be held." The Commission issued another report on August 3, 1943 (R. 313), granting only in part the relief sought by the carrier.

It noted in its report that so long as appellant could not collect a 9-cent cash fare, appellant would lose in excess of $1,000 a day of the revenue the Commission had intended to accord appellant by such order (R. 319). In finding that it would be impossible for appellant to collect a 9-cent cash fare, the Commission said:

> Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a

> cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line. (R. 325–326.)

The Commission, however, denied so much of the appellant's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied appellant the right to charge a 10-cent cash fare on its downtown line pending its ability to obtain tokens and to modify its fare collection boxes (R. 325).

On September 13, 1943, Jersey City filed its original complaint in the District Court specifically asking that the Commission's order of August 3, 1943, be enjoined only (R. 10)—

> *in so far* as such order permits the establishment of any local interstate fare *in excess of nine cents* for transportation on the downtown line. (Italics supplied.)

The original complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> 17. It is apparent that the Commission, in authorizing local downtown fares *in ex-*

> *cess of the nine cent fare* stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff (Jersey City) herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered *such matters* in this regard, it acted arbitrarily and beyond the realm of proper judicial procedure. (Italics supplied.)
>
> (R. 7.)

After the filing of this original complaint, the Commission, on September 18, 1943, reopened the proceeding on its own motion, but limited so as "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modification made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943" and to afford "any party hereto * * * the right to cross-examine adverse witnesses" (R. 23). In its supplemental report of November 2, 1943 (hereinafter discussed), the Commission referred to this reopening as being "out of an abundance of caution" (R. 274). At any rate it complied with the Price Administra-

tor's request, contained in its reply of July 14, 1943, to the carrier's petition for reopening, wherein (R. 364). he prayed: "In any event, before the fares are increased on the basis suggested by the Company, a further hearing should be held." This further hearing was held on September 28–29, 1943, and as stated was limited to certain issues as raised in the Court suit.

At the reopened proceeding on September 28–29, 1943, the following occurred (O. R. U., p. 2036):

> Mr. EISEN. [Counsel for Jersey City]. May I determine, please, whether or not the parties to this proceeding will be precluded from bringing the record down to date insofar as it is stale and such procedure would preclude any finding with respect to revenues?
>
> Examiner KOCH. If that has a bearing upon the issue as I have described it, it will be permitted. We will see when we get to it the particular evidence you have in mind.

Testimony was introduced concerning the impossibility of collecting a 9-cent fare with the present fare collection boxes (O. R. U., p. 2039–2048) and the statement made that under a 9-cent fare the railroad's earnings would be $385,000 additional, or more than $1,000 each day (O. R. U., p. 2052–2053). The Chairman of the carrier's Board of Directors testified concerning the earnings of his company on the assumption that 90 percent of

the passengers would purchase tokens, and stated that he arrived at his estimate that 90 percent of his patrons would purchase tokens by discussing it with transportation men and from his own observation as to the character of the Hudson & Manhattan traffic (O. R. U., p. 2072). He discussed the ability of the passenger using the railroad to spend a dollar for tokens (O. R. U., p. 2161–2162).

At pages 2169–2170 Mr. Eisen, counsel for Jersey City, stated:

> I am trying to develop whether this company needs revenues in excess of that to be produced by a 9-cent fare and I think that is directly in issue. If anything in excess of 9 cents is not to be predicated on revenue needs then I would like to inquire upon what ground this case has been reopened.

The examiner ruled that the question of whether or not the proposed basis shall stand was, of course, then in issue here (O. R. U., p. 2186). When Witness Fritsch, for the company, was asked how much additional revenue the Hudson & Manhattan would have received if fares of 9 cents downtown and 11 cents uptown had been collected by the carrier under the *Ex Parte No. 148** increase permitted by the Commission in February 1942, counsel for the O. P. A. objected because he claimed such issues

*Under this decision, the H. & M. could have increased its downtown fare from 8¢ to 9¢ and its uptown fare from 10¢ to 11¢. It requested the Commission to eliminate it from the permission granted, which was done. (R. 249–250.)

were not within the scope of the hearing (O. R. U., p. 2212). Somewhat inconsistently, we think, he complained of the restricted scope of the hearing, when he said:

> If the Commission desires to give us an opportunity to file briefs and will give us a reasonable time to file a brief, we will take advantage of that opportunity; however, I should like to make it clear that, considering the basic issues in which the Price Administrator and the Economic Stabilization Director are interested, that the limited state of the record, and the denial of our right to demonstrate on the basis of the existing financial conditions and earnings of the company that no rate increase whatever is justified, that we would have very little use in presenting a brief to the Commission because of the denial so far of the right to open up the record. (O. R. U., p. 2475).

Nevertheless a brief was in fact filed by the O. P. A., as well as by all other parties to the proceeding.

The examiner offered to the parties the opportunity to argue the case before him or file written briefs with the Commission (O. R. U., p. 2268). They accepted the offer to, and did, file briefs. The examiner also informed counsel for the Price Administrator that if he presented sufficient reason he would be given further time to present his case (O. R. U., p. 2273). Subsequently, this counsel's request for an adjournment of a "couple of weeks" was denied (O. R. U., p. 2478).

Witness Kosh for the Price Administrator stated he had prepared a table showing the 7 months condensed income statement for the Hudson & Manhattan predicated on its own figures for the first 7 months of 1943 (O. R. U., p. 2446). The examiner ruled he would not receive it (O. R. U., p. 2447) because irrelevant under the previous rulings made by him.

A similar statement for the five months ending May 31, 1943, had been attached to the reply of the Price Administrator of July 19, 1943, to the appellant's petition of July 8, 1943, for reconsideration and modification of the Commission's findings and order of June 8, 1943. In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of appellant from its railroad operations but was a consolidated statement of the income of the carrier from all operations, including its Hudson Terminal Buildings[1] and other real estate (R. 325).

The examiner rejected the proffered evidence as not being within the limitations of the Commission's order of reopening of September 18, 1943, but specifically advised counsel for the Price Administrator that if he desired to broaden the issues, he could petition the Commission for a

[1] The Hudson & Manhattan owns a large twin office building in New York City, described in the record (R. 290).

modification of that order for the purpose of receiving the rejected evidence (O. R. U., p. 2147–2148).

On October 14, 1943, the Price Administrator[8] filed a petition for modification of the Commission's order of reopening of September 18, 1943, so as

> to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen the proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942. (R. 70.)

The only specifications in such petition of the purpose of adducing such evidence read as follows:

> 8. Counsel for the protestant stated if given an opportunity to demonstrate by

[8] By letter of October 25, 1943, counsel for Jersey City purported to —

> adopt and otherwise ratify the contents of the aforesaid (Price Administrator's) petition as though it were our own.

This letter did not comply with the Commission's General Rules of Practice respecting petitions for rehearing, etc., and consequently was not treated as such by the Commission in its report of November 2, 1943.

> presentation of evidence at the hearing, he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase.
>
> (R. 69.)

On November 2, 1943, the Commission issued its report and order (R. 272) which, with the report of June 8, 1943 (R. 248), the District Court has enjoined. (R. 220.)

The Commission's report of November 2, 1943, after reciting that it issued the order of reopening of September 18, 1943 "out of an abundance of caution" (R. 274) stated, with reference to the further hearing held on September 28 and 29:

> At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding "for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including

evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942," called the Stabilization Act. To this motion respondent replied. Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted. (R. 274.)

The Commission said:

In the complaint of the City of Jersey City before the District Court [i. e., the original complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to $9\frac{1}{11}$ cents. (R. 275.)

The Commission concluded:

At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agree-

ment of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled. (R. 275.)

Having reached this conclusion, the Commission said:

Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.* (R. 276.)

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.* (R. 277.)

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondnt, is impracticable.* (R. 278.)

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report (i. e. June 8, 1943) as necessary to insure adequate transportation service.* (R. 278.)

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.* (R. 282.)

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.* (R. 283.)

The Commission's ultimate conclusion was:

Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we affirm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and mainte-

nance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.
(R. 284.)

On November 18, 1943, Jersey City filed its amended complaint herein asking that the Commission's orders of June 8, 1943, and November 2, 1943, be perpetually set aside, annulled, and enjoined insofar as such orders permitted any fare on appellant's downtown line in excess of 8 cents (the fare authorized by the Commission's order of June 11, 1938) (R. 40).

The Price Administrator filed his petition of intervention alleging that the Commission's orders in permitting an increase over the 8-cent fare in effect on September 15, 1942 (i. e., the fare authorized by the Commission's order of June 11, 1938), were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942 (R. 64).

The United States was named as a defendant but filed a neutral answer on the ground that a question of the relative powers of two agencies of the government were involved (R. 92).

The Commission and the appellant Railroad Company filed answers to the amended complaint and to the petition of intervention (R. 71, 88).

Both appellees applied for an interlocutory injunction, which was granted November 26, 1943 (R. 116), and on January 12, 1944, the majority of the court below rendered an opinion (R. 194),

Judge Fake dissenting (R. 201), holding the order invalid because of the Court's view that the Commission had denied a full hearing in refusing to reopen the proceedings to receive evidence relating to 1943 earnings of the carrier (R. 199), and that the Commission had not given sufficient consideration to the question of the inflationary aspects of the case (R. 201).

From the final decree granting a permanent injunction the Commission and the carrier appealed to this Court, and probable jurisdiction was noted April 3, 1944 (R. 433).

SUMMARY OF ARGUMENT

1. The Commission conducted elaborate hearings, at which the City of Jersey City appeared and introduced considerable evidence, and at which the Price Administrator entered an appearance but did not seek to introduce any evidence as to the inflationary effects of the Hudson & Manhattan's application for an increase in its downtown fare from 8 cents to 10 cents to meet increased costs due to the war. As a result of these hearings the Commission on June 8, 1943, permitted an increase in the downtown fares, not to the 10 cents sought by the carrier, but to 9 cents, an increase of 1 cent in the present fare. The report of June 8, 1943, contained a full discussion by the Commission as to the reasons for its action. Following this decision authorizing

the 1-cent increase, the carrier filed a petition with the Commission alleging that on account of the mechanism of its fare collection boxes, it was impossible to collect the 9-cent fare, which necessitated the use of 5 coins, all dropping into the box at the same time, and further alleging that due to the war new fare collection boxes could not be obtained, even if such boxes could be constructed to handle 5 coins at one time. Without further hearing, but following printed replies by the City of Jersey City and the Price Administrator, the Commission, on August 3, 1943, permitted a modification of its order so that the carrier could sell 11 tokens for a dollar, or at the rate of $9\frac{1}{11}$ cents a ride (or 10 cents cash for the rider preferring not to buy tokens), the tokens to be used interchangeably on the uptown line, where the fare for many years had been 10 cents cash, and on the downtown line. Thus the increase in the downtown fares was offset to some extent by the decrease in the uptown fares. Jersey City filed a complaint in the District Court attacking the action of the Commission in permitting any increase over 9 cents on the ground that the action of the Commission had not afforded it an opportunity to be heard. The Commission then reopened the case limited to the issue as to the modification of the 9-cent fare, and overruled the contention of the Price Administrator to the effect that the case should be reopened without

restriction, or at least to the extent of permitting him to show that due to increase in number of passengers carried, the Hudson & Manhattan would make sufficient money to meet increased operating expenses and the interest on its bonds under the 8-cent fare. The Commission conducted a rehearing, considered the contention and weighed the proposal of the Price Administrator and the evidence attached to his motion to reopen, and held that it was not sufficient to change its conclusions as to the reasonableness of the rate established by it. This was done in a third report dated November 2, 1943. The increases authorized were to expire 6 months after the termination of the war. We contend that a full hearing was not denied here any more than in *Vinson* v. *Washington Gas Light Co.*, decided March 27, 1944.

2. The Commission did not "lightly brush aside" as found by the District Court, in a divided opinion, the contentions of the Price Administrator that the increase would have an inflationary effect. As shown by its reports in this case, and in other cases to which it referred herein, where similar contentions had been made, it has always carefully considered this argument. There is no question but that the costs of the carrier have gone up due to war conditions and it, being exclusively a passenger-carrying road, must look to the passengers to supply it with additional revenues. To show the inflationary ef-

fects of an increase, the Administrator must do more than make a general allegation that inflation will result. *Vinson* v. *Washington Gas Light Co., supra.* It was not his contention that the increase in and of itself would be inflationary, indeed he admitted that such an argument would be "asinine". It was his point that the increase would be the beginning of a spiral of increased costs, which should be nipped at its inception. The District Court (Judge Fake dissenting) adopted this view. But it will have to be admitted that the costs of the carrier have increased and as the Commission has no jurisdiction over anything but the rates of the carrier, it had no alternative but to authorize an increase in rates to meet the increased costs.

3. The evidence was sufficient to support the order. It was substantially the same as that found sufficient in a prior case involving the same company, *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. This evidence, set forth in some detail in an appendix to the brief, showed characteristics of the carrier; increase in traffic due to the war; bus competition; estimates of diversion; commutation fares of other railroads; traffic density; ferry fares and competition, etc. There was in this evidence that out of which a body of experts could name a rate. (*Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 550.)

ARGUMENT

I

The Commission Did Not Err in Refusing, After Having One Full Hearing upon Which It Authorized an Increase in Passenger Fares, to Reopen the Proceeding on All Issues

We do not think it will be seriously contended that, as found by the Commission (R. 267), the costs of operating the Hudson & Manhattan Railroad Company have greatly increased due to war conditions. The difference in the respective contentions appears to be: The Commission thinks that these increased costs should be borne by a slight increase in the fares paid by the passengers of the carrier, and it, being exclusively a passenger-carrying railroad, cannot look elsewhere for increased revenues; on the other hand the City of Jersey City and the Price Administrator argue that the increase in the number of passengers carried due to war conditions, will result in such an increase in revenue to the carrier that an increase in fares is not justified. The Commission, of course, has the duty of seeing to it that the railroads of the United States are given sufficient income to provide the people of the United States with an adequate system of transportation (*New England Divisions Case,* 261 U. S. 184, 189) and it has found, in this very case, that the increase authorized is necessary for the Hudson & Manhattan "to meet increased operating expenses and the interest on its bonds" (R. 269),

and "to insure adequate transportation service." (R. 278.)

This court has often said that it will not substitute its judgment for that of the Commission on administrative matters. The Commission gave full consideration to the increased revenues resulting to the carrier from its increase in traffic (R. 268), nevertheless, it found that the increase was justified. It would appear to be a clear substitution of judgment for the court to hold that, instead of looking to each passenger to pay a modest increase, the carrier instead should be restricted to meeting increases in costs solely out of the number of passengers carried, which fluctuates from month to month, figures with respect to which were before the Commission down to the latest available at that time. (R. 267–8.) It is to be remembered also that the increase in fares is limited to the war's duration and 6 months thereafter (R. 283–4), clearly showing that in the view of the Commission it is a war emergency measure.

In considering whether the Commission erred, as held by the lower court, in not reopening the proceedings without restriction as contended by the Price Administrator, we must have in mind what Judge Fake, in his dissenting opinion below, said:

> Of course the flow of economic change never stops—always and forever the comings and goings and doings of man have their effect in preventing a static period at

> which time the Commission might stop and make a decision. Always the point of termination must be fixed in the midst of fluctuations in the economic factors involved. * * * (R. 205.)

The granting or denying of a petition for rehearing is discretionary with the Commission. Section 17 (6) of Part I of the Interstate Commerce Act, among other things, provides:

> * * * Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, etc.[9]

---

[9] The Rules of Practice of the Commission, effective September 15, 1942, provide in Rule 101 for the filing of petitions for rehearing. That Rule reads: (R. 87–88)

> *Rule 101. Petitions for rehearing, reargument, or reconsideration.*—(a) IN GENERAL.—A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.
>
> (b) REHEARING OR FURTHER HEARING.—When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.
>
> (c) MODIFICATION OF EFFECTIVE DATE.—A petition under this rule seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed

We think the facts in this case clearly show that there was no abuse of discretion on the Commission's part. A chronology of those facts follows:

On June 27, 1942, more than 6 months after our entrance into the war, the carrier filed its application for an increase in its passenger fares on the downtown line (R. 249, 390).

On July 6, 1942, Jersey City filed its opposition to this petition (R. 404), and on July 10, 1942, the Hudson Bus Corporation filed another statement in opposition.

---

therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) RECONSIDERATION.—If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) TIME FOR FILING.—Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days, after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

(f) SUCCESSIVE PETITIONS ON SAME GROUNDS, NOT ENTERTAINED.—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.

(R. 87–88).

On July 13, 1942, the Commission reopened the proceeding for further hearings (R. 412).

From September 9 to 12, inclusive, and also on September 17, 18, and 19, 1942, hearings were conducted before an examiner. At these hearings counsel for the Price Administrator entered an appearance but introduced no evidence (O. R. U., p. 1556–1557) (R. 264).

On September 19, 1942, the last day of the hearing, the examiner gave all parties 30 days, or until October 19, 1942, to file briefs (O. R. U., p. 1928).

On October 24, 1942, briefs were filed by all parties other than the Price Administrator, whose brief was in fact filed on December 14, 1942, upon special permission granted.

On January 25, 1943, the examiner's proposed report was issued, recommending a 10-cent fare on the downtown line.

On March 8, 1943, exceptions to the report were filed by the City of Jersey City and the Price Administrator (R. 365). On March 18, 1943, the Hudson & Manhattan filed a reply to these exceptions.

On April 20, 1943, a stipulation was signed by all counsel directing attention to the closing of the hearing in September 1942, and stipulating that the total number of passengers and total revenue for the months of January and February, 1943, the last months for which those figures were available, should be incorporated into the record to bring it down to date (R. 410).

On the same date, April 20, 1943, the case was argued and submitted to the full Commission for decision. (R. 248.)

On June 8, 1943, the Commission issued its report, finding that a 9-cent fare had been justified on the downtown line (R. 248). Three of the Commissioners thought that the carrier had justified a 10-cent fare; none voted for less than 9 cents (R. 271-272).

If it had been practicable for the carrier to have availed itself of this permission to collect 9 cents per passenger, it would have been receiving about $1,000 a day more in revenue, to which the Commission had found it entitled, since June 1943 (R. 319). However, because of mechanical limitations in the fare collection boxes, the carrier on July 9, 1943, filed a petition for reconsideration, setting up such mechanical limitations, and asking for leave to charge 11 tokens for a dollar or 10 cents in cash, and until such essential metals could be secured to strike off the tokens to charge 10 cents in cash, the fares to be uniform on both the downtown and uptown lines (R. 327).

On July 17 and 19, 1943, the City of Jersey City and the Price Administrator filed replies to the carrier's petition. (R. 345, 352.)

The Price Administrator in his reply suggested that before "the fares are increased on the basis suggested by the Company [that is, 11 tokens for a dollar or 10 cents cash] a further hearing should be held" (R. 364).

On August 3, 1943, the Commission issued its report on reconsideration, modifying its findings of June 8, 1943, so as to find justified an alternative fare of 11 token for a dollar or 10 cents in cash, and denying the carrier's petition in other respects.

On September 13, 1943, Jersey City filed its original complaint in the District Court, attacking the increase only insofar as it authorized fares in excess of 9 cents, claiming it had been denied a hearing on the necessity of selling tokens and the modification allowed by the August 3, 1943, decision (R. 7, 10).

On September 18, 1943, the Commission "out of an abundance of caution" (R. 274) reopened the case on certain issues.[10]

On September 28–29, 1943, the reopened proceedings were further heard, and on October 14,

[10] The order of reopening (R. 23) reads as follows:

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,

It is ordered, That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission.

It is further ordered, That this proceeding be assigned for such further hearing before Examiner Koch

1943, the Price Administrator filed a petition seeking to supplement the record to bring it "up to date." (R. 67.)

On October 25, 1943, the carrier filed a reply to the petition of the Price Administrator (R. 380).

On November 2, 1943, the entire Commission rendered its decision, finding as a result of the new hearing, that the carrier had justified the modifications sought, namely: in lieu of a 9-cent uncollectible fare, a fare of 10 cents cash or 11 tokens for a dollar, applicable on both the uptown and downtown lines (R. 272). As the former fare on the uptown line had been 10 cents cash, the modified order resulted in a decrease. The lower court has annulled the orders of June 8, 1943, and November 2, 1943, on two grounds, one of which was that the Commission denied a fair hearing. (R. 197.)

The above facts, recited in some detail, refute this holding. It is submitted that the Commission, considering the size of record and the vigor with which the case was prosecuted by both sides, proceeded with reasonable despatch. In fact no claim of error was made at the time the Commission authorized an increase to 9 cents (R. 248). But for the impossibility of collecting such a fare

---

in the Commission's Offices at Washington, D. C., on September 28, 1943, at 10:00 o'clock A. M.

The September 18 order was modified at the hearing closed on September 29, 1943 by all parties agreeing to file briefs to be submitted to the Commission and waiving oral argument (O. R. U. 2476-7).

with the present boxes, it is likely there would have been no law suit, for when Jersey City filed its original complaint, it did not attack the increase to 9 cents, but only the modifications made by the August 3, 1943, report. (R. 7, 10.) If the appellees really thought that conditions had radically changed, they would not have sat idly by and let the Commission decide the case, on the theory (1) that perhaps the decision would be in their favor by denying the increase, or (2) if the increase was granted, then they would attack the order on the ground that the record was not representative of present conditions. The situation is very much like that before this court in *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, where, at page 494, this court said:

> * * * The decision in the *Santa Fe case* is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.
>
> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition.

> They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

Any other rule, so it seems to us, would "disenable the Commission to protect the interest of the public". For, as is well known and as Judge Fake points out in his dissent (R. 105), conditions are not static and there is no "period at which time the Commission might stop and make a decision". In a case of this kind, of necessity the Commission must stop and study the evidence in order that it make findings that comport with the evidence (*Florida* v. *United States*, 282 U. S. 194, 215). If it does so, must it take the risk that its report will be set aside because of "changing conditions"? The choice then left to the Commission would be indeed "between the rock and the whirlpool".

The decision in the *Santa Fe case* [284 U. S. 248] upon which the lower court relied, rests on its own peculiar facts, and its doctrine will not be extended, as the decision in the *Northern Pacific case, supra*, shows. In the *Santa Fe case* the record closed in September 1928 prior to the economic depression of 1929. The petition for rehearing, which was denied, was filed 2½ years later, when conditions of course

were altogether different. Under such circumstances, this court held, in the *Santa Fe case,* that the Commission had abused its discretion in denying the petition for rehearing. In a subsequent case, *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, Justice Brandeis (concurring on behalf of four Justices) speaking of the *Santa Fe case,* said (p. 389):

> The case at bar is not like *Atchison, T. & S. F. Ry.* v. *United States,* 284 U. S. 248, where the order was set aside because the Commission refused to reopen the case and hear additional evidence. That offered was of changed conditions; important, because every rate-order is subject to revision upon changes in conditions, and the change which had occurred since the hearing was catastrophic. To refuse to reopen the hearing under those circumstances was held to be an abuse of discretion. In the case at bar no controlling change of condition was alleged. There was not even a claim of newly discovered evidence. The *Atchison* case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing. Compare *United States* v. *Northern Pacific Ry.,* 288 U. S. 490, 492 *et seq.; Illinois Commn* v. *United States,* 292 U. S. 474, 480–481; *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

Then, also, substantially the same information that the appellee sought to have the Commission

consider had been called to its attention for at least the first 5 months of 1943. In the report of August 3, 1943, the Commission said (R. 324):

> The number of interstate local passengers carried on the downtown line in the first half of 1943, as shown in respondent's petition, adjusted to an annual basis, reflects an increase over 1941 of 18.2 percent, compared with an increase of 12.7 percent as estimated by us in arriving at the forecast of probable revenue results made in the prior report. The traffic or revenue results from respondent's railroad operations as a whole, however, for the first half of 1943 or for any other period subsequent to those for which the results were of record at the time of the prior report, are not before us, and we have no reason for believing that they vary substantially from the estimates employed in arriving at our forecast of respondent's probable net income available for bond interest as set forth in that report.
>
> The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first 5 months of 1943. The "deficit" so shown is $75,798, and for the 12 months of the year would be $181,915, which, according to this protestant, would leave available $1,203,635 for interest on the income bonds, equivalent to 4.34 percent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 percent, as we estimated would

> result from the amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the "deficit" and other results given for the 5-month period are not for the railroad operations only, but also include the operation of respondent's terminal building, and therefore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior report is based was closed.

Apparently what the Price Administrator wanted to do was to show the same information for a 7 months' period (R. 69) instead of the 5 months' figures the Commission considered, as shown by the last quotation. In the report of November 2, 1943, the Commission said (R. 275):

> Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted.

Such motion was denied for the reason, as explained in the Commission's report of November 2, 1943 (R. 275), as follows:

> At the time of the oral argument before us on April 20, 1943, on the facts of record

> upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of, our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved cannot be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled.

As stated by the Commission in its report of June 8, 1943, "the Price Administrator offered no evidence" (R. 264). The situation of the Price Administrator in this case is quite like that of the Administrator before the District of Columbia commission which was before this Court in *Vinson, Director* v. *Washington Gas Light Co.*, No. 396, decided March 27, 1944. This Court there said:

> The petitioners seek vacation of the order on the ground that the Commission denied them a full and fair hearing. This contention is based upon the substantive contention that, under the Acts of January 30 and October 2, 1942, they were entitled to demand that the Commission enlarge the scope of the hearing and convert the inquiry into one whether an increase of rates was necessary to the company to prevent hardship. The Commission, on the other hand, insists that it was entitled to conduct the proceedings in accordance with its statutory powers as they existed prior to 1942, and, at most, accord the petitioners a full hearing as to the effect of any order in its relation to inflation in the war emergency. Thus it appears that the controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances.
>
> In view of the petitioners' insistence that they were entitled, in effect, to control and direct the inquiry without regard to the statutory powers of the Commission, we shall first examine the extent of the authority conferred upon petitioners by Congress.

With respect to the participation of the Administrator in rate cases, the opinion reads:

> * * * Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation,

but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles,* No. 112 October Term 1943, was careful "to avoid paralyzing or extinguishing local institutions." Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.

If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which were not shown to be necessary to prevent

> actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra,* as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do.

The Court sustained the procedure followed by the District of Columbia Commission and its opinion concludes as follows:

> * * * In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and overall conditions in the national economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

It cannot be urged by appellees that until the Commission decided the case on June 8, 1943 (R. 248), finding a 9-cent fare on the downtown line justified, any claim was made by them that condi-

tions had changed so as to make the record unrepresentative. They took a chance on a favorable decision on the record as made. Between the date of its report of June 8, 1943, and the Commission's report on rehearing November 2, 1943, less than 5 months elapsed. It is hardly likely, in view of the full picture that the Commission had before it and which has been heretofore referred to, that any great change in conditions occurred requiring the Commission to in effect scrap everything it had done and reopen the case without restriction as to the character of the evidence. In *Acker* v. *United States,* 298 U. S. 426, at page 433, this Court said:

> The amended petition was filed about three months after the original order issued. It is inconceivable that economic conditions had so altered in this brief period as to demonsfrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive. The schedule should have been given a trial and any alteration or modification should have been asked in the light of more extensive experience. We are unable to find anything arbitrary or unreasonable in the denial of the petitions.

The Commission in its report of August 3, 1943, adverted to the fact that had the Hudson & Manhattan availed itself of the permission granted in *Ex Parte 148,* the *General Increase Case,* to advance its fare 10%, such fares would have been 11

cents on the uptown line and 9 cents on the downtown line (R. 318). If it had done so the increased revenue it would have collected in 17 months was estimated to amount to $750,000 (R. 319). This is increased revenue to which the carrier was found entitled by the Commission. Considering the fact that it has lost this large amount, and also that the increase above 8 cents is to terminate six months after the close of the war, it would seem that it is entitled to the relief now if it is to be effective at all. The rates should be tried out at least for an experimental period, remembering that any party in the light of that actual experience is free to return to the Commission to seek a modification of its findings (R. 282).

Not only that, but when the Commission found, based upon the record made in 1942, that approximately 90% of the patrons of the railroad would purchase tokens and only 10% pay the higher cash fare, an estimate which the Commission said "we may accept as reasonable" (R. 322) the Price Administrator urged, based upon a report made in 1937 (R. 279) that such an estimate was unjustified.[11] In other words he criticises the Commis-

[11] Mr. Brown, Chairman of the Board and a former Postmaster General, testified that he arrived at his estimate that 90% of the patrons of his company would purchase tokens by discussing it with transportation men and from his own observation as to the character of the traffic on the Hudson & Manhattan (O. R. U. 2072). See also, O. R. U. 2161. He also testified as to the ability of the patron of his line to spend a dollar for tokens at one time (O. R. U. 2161–2162).

sion for not reopening the case to permit the introduction of evidence with respect to a very few months in 1943 following a decision of June 8, 1943 (R. 248), and at the same time inconsistently relies upon a 1937 report to try to weaken the use of the Commission's 90%–10% ratio, a ratio fully discussed in the final report (R. 279–282) and shown heretofore (p. 48) to be supported by the evidence.

Finally, on this point, we quote from the 1943 report of the Section of Public Utility Law to the American Bar Association on "Problems of Rate Making in the Emergency," undated, which, at p. 48, reads:

> It is doubtful that intervention by the Office of Price Administration in proceedings involving investigations of the reasonableness of existing rates and the filing of complaints as to the level of such rates are proper in view of the express language of the Congressional act. This proposition, however, has not been passed upon by the courts. It is the consensus of the committee that existing regulatory agencies are capable of protecting the public from unreasonable rates—such agencies are fully conscious of existing economic conditions and the evils of inflation. Undue interference with their powers and prerogatives will not be permitted without a struggle. When the war is over and there is a return to normalcy the established regulatory

> agencies must then carry the burden of regulating utilities and common carriers. Agencies created because of the war will be soon forgotten.

A "full hearing" was defined by this court in the *New England Divisions Case*, 261 U. S. 184, at page 200, as follows:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing.

It seems clear that the Commission granted a full and fair hearing to all parties in this proceeding.

II

The Commission Did Not Disregard the Provisions of the Inflation Act of October 2, 1942

We think that the holding of the lower court that the Commission "lightly brushed aside" the contentions of the Administrator (R. 199) with respect to the inflationary aspects of a rate increase is clearly erroneous and contrary to the facts.

The Commission has always given respectful consideration to the contentions of the Price Administrator and the Director of Economic Stabilization; it has recognized, however, that it should be supplied with evidence in support of these con-

tentions. One of the leading cases in which its views on this question are expressed is its report of December 18, 1942, in *Increases in Texas, Rates, Fares, and Charges,* 253 I. C. C. 723, where, at pages 733–734, the entire Commission said:

> By brief filed October 12 and at the argument on November 5, 1942, the Price Administrator, representing himself and the Director of Economic Stabilization, actively opposed the proposed increases in this proceeding within the State of Texas. He urged that, under the Emergency Price Control Act, as amended, in determining the lawfulness of proposed increases in rates, fares, or charges for transportation by common carriers subject to our jurisdiction, the effect of such increases on the price control and stabilization program is a factor which we can and should consider in addition to the factors ordinarily considered under the Interstate Commerce Act.
>
> The amendatory act of October 2, 1942, makes no direct changes in, or additions to, the administrative provisions of the Interstate Commerce Act relative to transportation rates and charges, except the requirements as to notice to, and intervention by, the designated Federal agency, which requirements have been met in this case. Its provisions are similar in some respects to those contained in the Agricultural Adjustment Act of 1938, section 201 (a) (7 U. S. C., Supp., IV. 1291) and in the Bituminous Act of 1937, section 16 (15 U.

S. C., Supp. III, 836), authorizing the Secretary of Agriculture and the Bituminous Coal Commission to file complaints with us with respect to the rates on farm products and coal, respectively, and providing that, before hearing or disposing of any complaint filed by any person other than the Secretary of Agriculture concerning rates on farm products, or the Bituminous Coal Commission with respect to rates on coal, we shall notify those respective agencies of such proceedings and, upon their application, shall permit them to appear and be heard. It has never been contended that those provisions modified the provisions of the Interstate Commerce Act.

* * * * *

We are not unmindful of the evil effects of inflation, and, in our judgment, the inflationary tendencies of general increases in rates constitute a factor which we may and should take into consideration in passing judgment upon such increases. See sections 1 and 15a of the Interstate Commerce Act, the national transportation policy contained in section 1 of the Transportation Act of 1940, and *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. Increases in the general price level ultimately affect the costs of rendering transportation service and the value of such service to the public. Such considerations were in fact carefully weighed and reflected in the increases which we authorized under *Ex Parte No. 148.*

> These increases were graded from nothing at all through 3 percent and 6 percent on freight to 10 percent on passenger traffic. * * *

Without repeating those views in its reports of November 2, 1943 (R. 272), in this case, it made reference to the *Texas Case*, among others (R. 283).

In the Commission's report of June 8, 1943 (R. 248), the Commission also said:

> The Emergency Price Control Act of 1942, as amended by the Stabilization Act of October 2, 1942, is designed in general to prevent inflation or increased living costs. It provides, however, that nothing in that act shall be construed to authorize regulation of rates charged by any common carrier or other public utility. An executive order of the President, dated April 8, 1943, reads in part as follows:
>
> > The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.

> The Price Administrator urges that successful control of threatened increases in rates is now wholly dependent upon agencies such as the Commission, and that it is our primary responsibility to prevent inflationary rates and charges in this field, and to forestall unnecessary increases in the cost of living which would result from higher rates and charges. The proposed increase, when coupled with other increases in the cost of living, he maintains, would "commence the rise of that spiral which, if not arrested, must lead to inflation." He takes the position that any increase in rates or fares, unless clearly shown to be necessary to preserve existing facilities under current conditions, would be in conflict with the Administration's price control program, and that since the increase here proposed would have a substantial bearing upon the cost of living in the communities served by respondent, it would be contrary to the Stabilization Act and should be condemned. (R. 265.)

In its major findings and conclusions (R. 270), the Commission found:

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that

the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

> Based upon the foregoing facts, we find that in order to meet increased operating expenses and the interest on its bonds, respondent is in need of additional revenue beyond that which may be expected from its present fares and divisions, and that a portion of such additional revenue can reasonably, and should, be obtained by increasing its downtown fare from 8 to 9 cents.

And also in the report of August 3, 1943, the Commission had in mind these contentions, when it said (R. 324):

> The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first 5 months of 1943. The "deficit" so shown is $75,798, and for the 12 months of the year would be $181,915, which according to this protestant, would leave available $1,203,635 for interest on the income bonds, equivalent to 4.34 percent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 percent, as we estimated would result from the amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the "deficit" and other results given for the 5-month period are not for the railroad

operations only, but also include the operation of respondent's terminal building, and therefore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior reports is based was closed.

The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate.

As said by this Court in its decision of February 28, 1944, in No. 316, *The Hecht Company v. Bowles* (p. 8 of slip opinion): "The Administrator does not carry the sole burden of the war against inflation." How well the Commission has shared in this important task is clearly shown by its 57th Annual Report to Congress (dated November 1, 1943) where it compared conditions which prevailed during World War I and the two years

prior to November 1, 1943. At page 12 of this Annual Report, the Commission reported to Congress:

> We have endeavored to assist in carrying out the important policy outlined in this directive. In this connection a comparison of conditions which prevailed during World War I with those of the past 2 years is of interest.
>
> During the 4 years following the outbreak of World War I in 1914, there were three freight rate increases, one of 5 percent, a second of 15 percent, both limited to official territory but amounting, on a national basis, to 2.4 and 7.2 percent, respectively, and a third general increase intended to produce 25 percent but which because of specific increases allowed may be calculated at approximately 20 percent. The aggregate of these increases may be estimated at 31.7 percent. During the 4 years following the outbreak of World War II in 1939, only one general freight rate increase was authorized by this Commission (*Increased Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 612, March 2, 1942). This increase amounted to 6 percent except that it was limited to 3 percent on the basic or raw products of agriculture, animals and products, and the products of mines, except coal, coke, lignite, iron ore, and sinter. No increases in the rates on iron ore and sinter were permitted and the increases in coal, coke, and lignite ranged from 3 to 6

cents per ton. Because of the exceptions noted, we estimate the total amount of the increases allowed at 4.7 percent. This increase was subsequently suspended.

The railroad freight rate increases in the first 48 months of World War I and World War II compare with the increases in wholesale prices for the corresponding periods as follows:

	Freight rate increases	Wholesale prices, all commodities	Wholesale prices, excluding farm products and foods
World War I, August 1914–July 1918	[1] 31.7	96.1	92.4
World War II, September 1939–August 1943	[2] 4.7	37.1	21.5

[1] This figure assumes that the third rate increase in this period of 25 percent averaged about 20 percent. If 25 percent, the increase would be 37.5 percent.

[2] Suspended until Jan. 1, 1944, by decision of Apr. 6, 1943; later suspended until July 1, 1944.

In the face of the statements heretofore quoted from the reports of the Commission, pages 51–56 of this brief, we think the lower court was not justified in saying that the Commission "lightly brushed aside" the contentions of the Administrator (R. 199). The facts are directly to the contrary. It must be remembered that costs of labor and materials which this carrier has to pay have gone up and these increased costs have greatly added to its burdens. The Commission has no control over these increased costs, but only over its rates. Consequently, it is difficult to see how the

Commission could do otherwise than allow the increase. (*Vinson, et al.* v. *Washington Gas Light Co.*, decided March 27, 1944.)

III

The Increase Authorized by the Commission Was Supported by the Evidence

Although the lower court discussed only the two questions covered so far in this brief, we assume that the entire case is here for review (*United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, at p. 494).

The evidence in this case followed largely the pattern of the evidence in *Hudson & Manhattan R. Co.* v. *United States*, sustained in 313 U. S. 98, against an attack on its sufficiency. It covered a wide variety of matters pertaining to this carrier. Some of the evidence has been referred to at pp. 16–19 of this brief. In order to keep our argument within reasonable compass, we are setting forth in Appendix B, pages 71–82, a summary of the evidence before the Commission, which we submit meets the "substantial evidence" rule, the record references all being to the unprinted original record filed with the clerk and stipulated as a part of the record in this case (R. 419).

One other matter should be referred to, and that is the question of interline divisions with the Pennsylvania Railroad. Much is made in their complaints and amended complaints by appellees of the admonitions contained in the Commission's

reports that the carrier might well look to the Pennsylvania Railroad for increased divisions. The Commission is the body which gave this admonition and the Commission is the body which is permitting this fare increase, so obviously it sees nothing inconsistent in its action. Nor is there. Until the question of reasonable fares is settled it is clear that the Hudson & Manhattan is hardly in a position to approach the Pennsylvania. In other words, it needs must have a stable basis before proceeding, and a stable basis would hardly exist until the court determines the validity of the fare order.

But there is testimony in the record dealing with this question. Witness Brown testified [12] (p. 1125) that there can be no increase in Pennsylvania divisions until the fare is settled. There is also testimony concerning Pennsylvania divisions and discussions at pages 1289–1290, 1298, 1309, and 1325 of the transcript. (See also Mr. Brown's testimony at pp. 1269–1273.) Mr. Bauman for the protestants had some discussion of this question at pages 1517–1518 of the transcript. At page 2074 Mr. Brown indicated they had preliminary conversations with the Pennsylvania concerning this question. At pages 2105–6, 2108–10, and 2111 appears also testimony of Brown concerning Pennsylvania divisions.

[12] The references here are to the original record, unprinted, lodged with the clerk as part of the record to which all parties might refer in brief and argument (R. 419).

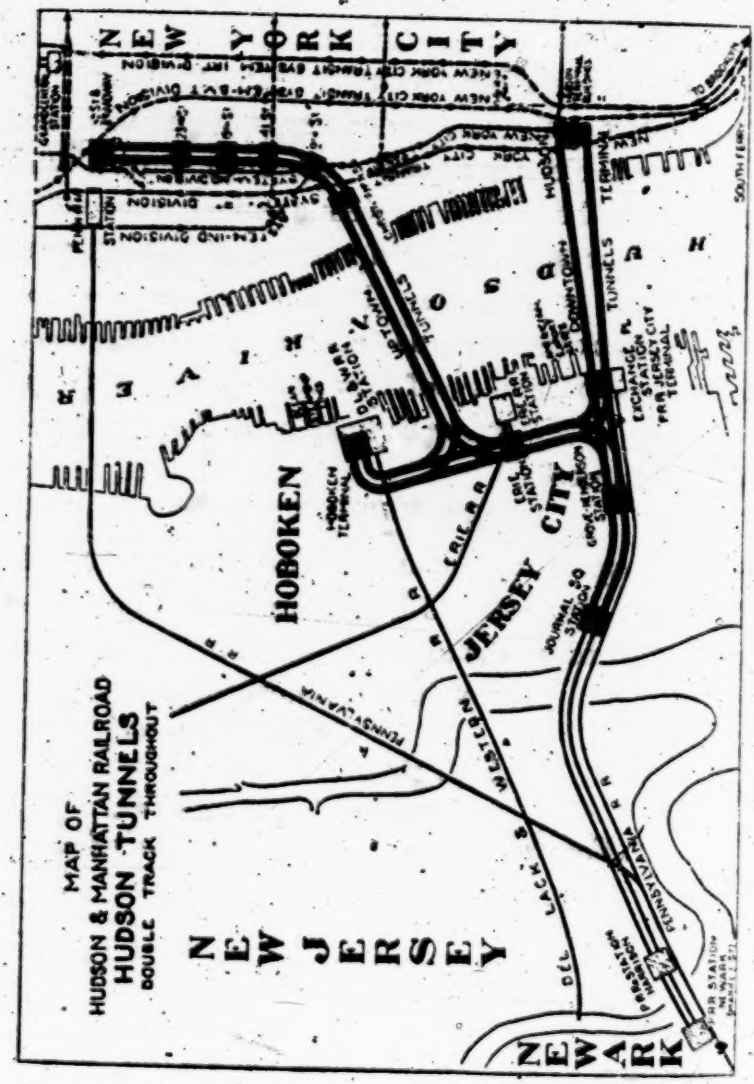
It would appear from the foregoing record references that the Commission knew just what it was doing and what it intended to do on this fare increase application.

In this respect the Commission in effect said to the Hudson & Manhattan: We have found what is the reasonable maximum downtown fare. We realize that the resulting revenue will not be enough to meet increased operating expenses plus all the interest on your bonds. If you feel inclined to press your revenue needs further, you should consider the advisability of increased divisions from passenger traffic interchanged with the Pennsylvania Railroad.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be reversed and the Commission's orders sustained.

DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.


MAP OF
HUDSON & MANHATTAN RAILROAD
HUDSON TUNNELS
DOUBLE TRACK THROUGHOUT
NEW YORK CITY
NEW JERSEY
NEWARK
HOBOKEN
JERSEY CITY
HUDSON RIVER
HOBOKEN TERMINAL
ERIE STATION
GROVE-HENDERSON STATION
JOURNAL SQ STATION
EXCHANGE PL STATION
PRR JERSEY CITY TERMINAL
PENNSYLVANIA R R
DEL LACK & WESTERN R R
ERIE R R
UPTOWN TUNNELS
DOWNTOWN TUNNELS
NEW YORK CITY TRANSIT SYSTEM IRT DIVISION
NEW YORK CITY TRANSIT SYSTEM BMT DIVISION
NEW YORK CITY TRANSIT SYSTEM IND DIVISION
PENN STATION
SOUTH FERRY
TO BROOKLYN
PRR STATION HARRISON
PRR STATION NEWARK

APPENDIX A

Pertinent provisions of Part I of the Interstate Commerce Act follow:

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(b) Nothing in this Act shall be construed to prevent any common carriers subject to this Act from entering into or operating under any contract with any telephone, telegraph, or cable company, for the exchange of their services.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or un-

justly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the law-

fulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge,

or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed change rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a. (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal in-

increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. III, § 942 (c)):

* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

That in order to aid in the effective prosecution of the war, the President is author-

ized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7:

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulations, price schedule, or order issued or effective under such Act.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Preventing Inflation, and for Other Purposes," as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the de-

velopment of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * *

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state, or municipal law in order to keep down the cost of living and effectuate the purposes of the stabilization program.

APPENDIX B

At page 59 of the Commission's brief, we referred to the fact that we would set out in an appendix, evidence which in our judgment was sufficient to sustain the Commission's order. This we now do, directing attention to the fact that the record references are to the original record in typewritten form which has been filed with the clerk but, pursuant to stipulation (R. 419), not printed.

At pages 1022–1023 of the testimony, Witness Day showed the ferries that had been discontinued since the last hearing and the increase in the fares of others. At pages 1086–1087, Witness Van Gieson showed the drop in passengers, 1941 compared with 1937. At page 1097 he also testified concerning maintenance expenses on joint service equipment, that is, on equipment used in conjunction with the Pennsylvania Railroad.

Mr. Brown, Chairman of the Board of Directors of the Hudson & Manhattan and a former Postmaster General, testified at pages 1120–1122 as to why the Hudson & Manhattan did not accept the *Ex Parte No. 148* increase. He testified at page 1122 and also at page 1125 that there should be no difference in the uptown and downtown fares. Mr. Brown, at pages 1126–1127, referred to the congestion resulting from an attempt to insert 9 cents in the fare boxes. He admitted (page 1132) that passengers fell off after the fares had been increased to 8 cents on the downtown line

and at pages 1136–1137 and also at page 1139, Mr. Brown testified as to increases in labor costs, 1941 over 1937, and also as to increase in the company's taxes. At page 1139 Mr. Brown specified the additional revenues needed to meet bond interest. (See also his testimony at page 1261.) At pages 1141–1142 Mr. Brown testified concerning the expansion of traffic on the Hudson & Manhattan resulting from the war. (See also pp. 1144–1145.)

Witness Slater testified and at page 1152 showed that the net income for 1941 was below that for 1937. At page 1164 he testified that the fare increase caused a diversion of 16.5 percent. At page 1168 he showed the reduction in the number of uptown passengers and at page 1174 the increase in busses and passengers crossing the Hudson River. At page 1179 Mr. Slater testified concerning increased taxes and increased revenues to the carrier. At pages 1184–1185 he showed increases in revenues and increases in operating expenses, together with figures for the year 1942 on increase in traffic. It was his opinion (p. 1187) that improved economic conditions would not cause as much diversion in the traffic as the prior increase. (See also his testimony at pp. 1242–1243 concerning this subject.) At page 1194 he showed the amounts by which the 8-cent fare failed to meet bond interest. At pages 1248–1249 Mr. Slater gave his views concerning diversion under 9-cent and 8-cent fares.

Witness Brown was recalled and at pages 1262–1263 he again emphasized the increases in expenses and taxes, and at pages 1264–1265 the ne-

cessity for his company's setting up a war hazards fund. At pages 1266 and 1268–1269 he showed the increased revenues needed by his company. He also showed (p. 1274) that the stockholders get nothing until the accrued bond interest in arrears is paid off. At page 1277 Mr. Brown testified as to changed conditions favoring the Hudson & Manhattan, and at pages 1278–1279 he showed how conditions differ now (in 1942) from those of 1938. At page 1280 he testified as to the amounts needed to pay current bond interest; at page 1282 he stated that the higher standard of living now prevailing would cause less diversion, and also showed the increase in Hudson & Manhattan traffic due to the war.

Witness Bauman for the protestants, page 1363, testified as to increase in certain ferry fares, which now sell 25 for $1.00. At page 1391 he advocated 60 rides for $3.00 on the Hudson & Manhattan. At page 1393, Mr. Bauman showed Hudson & Manhattan gains from the 8-cent fare and at page 1397 he testified as to the increased expenses of the Hudson & Manhattan. At pages 1436–1437 Mr. Bauman testified as to the character of workers in Jersey City and at pages 1458–1460, 1462, 1466–1467, and 1472–1473, he made estimates concerning future prospects for 1943 traffic. At pages 1485–1486 Mr. Bauman testified as to the effects of the depression on the Hudson & Manhattan and at page 1522 concerning the increase in its business due to the war. At page 1551 he spoke concerning the diversionary effects of an increase. At page 1645 he testified that the war workers using the Hudson & Manhattan received

higher wages than the previous class of commuters, and at page 1647 he showed the increase of traffic on the Hudson & Manhattan due to war conditions. At page 1648 he estimated the traffic for 1943, and at pages 1652–1653 the number of passengers and revenues to be expected in 1943. He conceded (p. 1654) that increased revenue will not produce a profit on account of increased expenses. At page 1671 he testified concerning 1943 traffic prospects.

Witness Cassidy (for the protestants) testified at page 1743 concerning a decline in traffic between 1938 and 1941 and said it was due entirely to the fare increase to 8 cents. He conceded, page 1806, that the regular customers would purchase tokens. At pages 1808–1809, Witness Cassidy testified concerning defense workers traveling during peak hours and at page 1884 he estimated 96,000,000 passengers would travel on the Hudson & Manhattan. At pages 1921–1922, Witness Slater showed that the Hudson & Manhattan earned over $236,000 more under the 8-cent fare than it did under the 6-cent fare.

Witness Brown appeared at this reopened proceeding and at pages 2039–2048 he testified concerning the impossibility of collecting a 9-cent fare with the present fare collection boxes. At pages 2052–2053 Mr. Brown testified that under a 9-cent fare the railroad's earnings would be $385,000 additional, or more than $1,000 each day. He also testified, at pages 2053–2055, concerning the earnings of his company on the assumption that 90 percent of the passengers would purchase tokens. At page 2067, he estimated a percentage

increase of 15 percent, 1943 over 1941. Mr. Brown also showed (p. 2072) that he arrived at his estimate that 90 percent of his patrons would purchase tokens by discussing it with transportation men and from his own observation as to the character of the Hudson & Manhattan traffic. He stated (p. 2076) that the uptown line handles about 25 percent of what the downtown line does. At page 2133 Mr. Brown testified as to the added costs from the use of tokens. He stated at pages 2135–2136 and at page 2137 that they expected additional revenue of $395,000. He discussed the ability of the commuter using his line to spend a dollar for tokens (pp. 2161–2162).

It was shown that had the company taken the *Ex Parte No. 148* increase it would be $750,000 better off (p. 2212).

At page 2275, Mr. Van Gieson stated that the Hudson & Manhattan carries 225,000 passengers a day between all stations and, at page 2276, stated that over 50,000 passengers a day enter the Hudson Terminal for transportation to New Jersey and the same number in the opposite direction. They pass the boxes at the rate of three people per second (p. 2277). Mr. Van Gieson stated his conclusions as to why 11 tokens for $1.00 was necessary or a straight 10-cent fare (p. 2395).

Witness Kosh, for the O. P. A., testified that in 1929 and 1930, 85 percent of the people using busses in Cincinnati purchased tokens (p. 2438). This witness said he had prepared a table showing the 7 months condensed income statement for the Hudson & Manhattan predicated

on its own figures for the first 7 months of 1943, compared with the first 7 months of 1942 (p. 2446). The examiner ruled he would not receive it (p. 2447) because it was irrelevant under the previous rulings made by him. Witness Kosh would express no opinion on the percentage of token passengers, 11 for $1.00 (p. 2459).

In addition to this oral testimony, numerous exhibits were introduced and which were competent for the Commission to consider in reaching its conclusions. Among these exhibits were the following:

Exhibit 5–R, consisting of 6 sheets, showed the Hudson & Manhattan passengers carried by routes, 1919 to 1941, inclusive. Exhibit 25–R, cost of construction of the railroad's properties to December 31, 1941; Exhibit 26–R, summary of bonds outstanding in the hands of the public up to December 31, 1941, and a supplement bringing that information up to August 31, 1942. Exhibit 27–R shows materials and supplies on hand on December 31, 1941; Exhibit 28–R is a record of interest and dividend payments from 1938 to 1941, inclusive, and Exhibit 30–R shows the local fares on the Hudson & Manhattan 1938 to 1941, the fares on the joint rapid-transit electric train service from 1938 to 1941, and a summary of the passenger traffic and revenue for the four years, 1938 to 1941, inclusive. A supplement brought the information shown on Exhibit 30–R down to August 1, 1942. Exhibit 36–R shows passengers carried by classes of fares, by stations of origin, and passengers carried in and out of New York by different trunkline railroads compared with the

Hudson & Manhattan; this exhibit also segregates the income applicable to railroad operations between uptown and downtown services for the year 1941; it shows the costs of various forms of tickets over various railroad lines, and compares rail and bus fares. Exhibit 33–R shows headway between trains; Exhibit 34–R the maximum traffic periods and service on August 19, 1942, and Exhibits 37–R and 38–R show the same information for the downtown and uptown lines. Exhibit 86–R shows passenger traffic and car service for August 19, 1942. Exhibit 4–R showed Hudson & Manhattan distances between stations and 5–R was a chart showing passengers carried 1920–1942, inclusive. Exhibit A was a comparison of volume of traffic for the period from January 1, 1942, through June 20, 1942, with the corresponding period of 1941; Exhibit B constitutes a comparison of operating expenses, taxes, and car-miles, 1937 and 1941; Exhibit C shows for the period August 2 to August 9, 1942, inclusive, the number of military and naval passengers using the Hudson & Manhattan and the number of civilians accompanying them; Exhibit G showed the rate of return from railroad operations at specified traffic levels based on 8-cent fare downtown, and also the same information based on a 10-cent fare downtown and assuming a 12 percent diversion of traffic, while Exhibit H (introduced by Witness Brown) was a history of one-way and round trip fares between the Pennsylvania and the Hudson & Manhattan from 1911 to August 1942.

Exhibit F–87 (Bauman) was a comparison of passengers carried with passenger car miles

1927 and 1937 to 1941, inclusive; Exhibit F-88 showed the trend in passenger traffic on the Hudson & Manhattan from 1937 to 1942; Exhibit F-89 compared loss or gain in local traffic originated in New Jersey between 1937 and 1941; Exhibit 90 showed population figures for 1940 of Hudson county cities, while Exhibit 91 showed the trans-Hudson automobile traffic, 1938 to 1941, inclusive. Exhibit F-92 showed New Jersey bus companies, areas served by them and their local fares to the Central Railroad of New Jersey depot. Exhibits 94, 95, and 96 were about the same as Exhibit F-92, except applying to the ferries of the Erie Railroad, the Pennsylvania Railroad, and the Lackawanna, respectively. Exhibit F-93 was a comparison of distances between stations in Jersey City and in New York City, with passengers originated in the year 1941; Exhibit F-98 was a comparison of present ferry fares applicable in New York Harbor, while Exhibit 99 compared Hudson & Manhattan downtown local traffic with railroad ferry local passenger traffic, 1937 to 1941. Exhibit 100 showed the same information compared with railroad passengers carried by ferries for the years 1937 to 1941. Exhibit F-102 showed the commutation fares on the Pennsylvania Railroad, while No. 103 was a comparison of gain or loss in passengers to, from, or within New Jersey, 1937 versus 1939, by classes of traffic, with gain or loss of trans-Hudson traffic of the Erie, Lackawanna, Pennsylvania, and Jersey Central. Exhibit F-104 showed loss in local passengers originated in New Jersey, 1937 compared with 1939, by stations of origin, while No. 105 was an analysis of traffic and revenue for

a typical day in 1938 and 1942. Exhibit F–107 was a comparison of the carrier's railway operating expenses and taxes, 1937 to 1941; Exhibit F–108 was a comparison of additional passenger revenue (at 2¢ per passenger) paid by downtown passengers with increases in operating expenses and taxes incurred by the Hudson & Manhattan for the years 1938 to 1941, using 1937 as a base. Exhibit F–109 compared increases in operating expenses and taxes incurred by the Hudson & Manhattan for the years 1938 to 1941, with additional revenue, if any, received from interline traffic, using the year 1937 as a base; Exhibit F–110 was an estimate of revenue gains to the Hudson & Manhattan and cost to passengers on proposed 10-cent fare, predicated on additional diversion of downtown traffic as a result of such increase, using 1941 as the base. Exhibit 111 showed revenue traffic and transportation statistics, downtown and uptown branches; Exhibit 112 compared downtown fares and Hudson & Manhattan proportion of joint fares, 1919 to 1942; Exhibit F–113 was a comparison of revenues received by the Hudson & Manhattan for transporting passengers ex-trunk line railroads and Exhibit 114 compared revenues, per mile, if ex-Pennsylvania R. R. earnings of the Hudson & Manhattan were increased 2 cents, compared with earnings it received on ex-Erie and ex-Lackawanna passenger traffic. Exhibit 116 compares revenue effect of increased fare upon the joint traffic of the Hudson & Manhattan and Pennsylvania R. R. between Newark and New York; Exhibit 117 was a Hudson & Manhattan statement of net income from all operations for years ending

December 31, 1941, and June 30, 1942. Exhibit 118 showed the Hudson & Manhattan income account for years ending June 30, 1941, December 31, 1941, and June 30, 1942, while Exhibit 119 was a comparative income statement of that carrier, for the period June 1938 to December 31, 1941, in cents per revenue car mile. Exhibit No. 120 showed the relationship of revenue requirements for interest by the Hudson & Manhattan with its operating expenses and taxes, in cents per car mile, for the calendar year 1940. Exhibit 122 compared gross income and interest requirements of rapid transit lines, in cents per revenue car mile, for the year ending December 31, 1940. Exhibit 123 was a comparison of passenger revenue per mile and operating ratio of the Hudson & Manhattan with rapid transit surface lines in New York City, for the year 1940. Exhibit 124 was a comparison of operating revenues and operating ratio of the Hudson & Manhattan with rapid transit surface line, including interstate operations, per car or per bus mile for the year 1940, while Exhibit No. 125 compared operating revenue per car mile and operating ratio, Hudson & Manhattan compared with rapid transit sub-surface lines in New York City. Exhibit 126 was a statement showing total increase in revenue, 1942 over 1941 (by months) under present fares and divisions. Exhibit 127 was a statement showing increase in revenue, 1942 over 1941, by months, under present fares on local traffic and an assumed increase of 2½ cents in revenue on interline traffic. Exhibit 128 showed 1940 to 1942 passenger increase or decrease by months, Hudson & Manhattan, also monthly increase 1942

over 1941; Exhibit 129 compared passenger revenues in United States and by Districts, July 1941 and July 1942.

Exhibit F–136, Witness Cassidy, was a traffic check at the Jersey Central Ferry on September 9, 1942.

Hudson & Manhattan Exhibit Q was a copy of a bill submitted by that carrier to the Pennsylvania Railroad showing balance due for July 1942, with respect to divisions and agreed charge for passengers transported in joint service and interchanged between the companies. Its Exhibit R showed trans-Hudson passengers handled by ferries of the railroads at New York segregated by railroad and local passengers for the years 1935 to 1941, inclusive. The carrier's Exhibit S was an analysis and restatement of protestant's Exhibit F–105, gains and losses peak and nonpeak hour traffic 1938 and 1942, based on a typical day in February 1938 and August 1942. Carrier Exhibit U was an analysis of passenger traffic for the 8-months period ending August 31, 1937, and 1942. The Commission also had before it as Exhibit 142 the report of the Committee on Fare Structure of the American Transit Corporation, as well as Exhibit 147, which was a statement showing the number of interstate local passengers carried during the year ending December 31, 1942, divided as between downtown and uptown passengers, the revenue therefrom on the basis of the present fares, the revenue on basis of proposed fares of 10-cents cash or 11 tokens for $1.00, with 10 percent of the passengers paying cash and 90 percent buying tokens, and showing also the increase in

downtown revenues and decrease in uptown revenues. Exhibit 148 showed the same information as No. 147, except it was for the year ending August 31, 1943, while Exhibit 149 contained the same information as Exhibit 147, except that it covered the period of 8 months ending August 31, 1943. Exhibit 150 showed the same information as No. 147, adjusted to a yearly basis. Exhibit 151 showed the rate of overloading of the coin boxes, while Exhibit No. 154 was a spot check of token use, showing result of such study.

We have gone into the evidence in some detail to show the scope of it before the Commission. Surely there was, as this Court has said, out of this mass of evidence enough for a body of experts to name a rate.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

FILED
APR 24 1944
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,

Appellants,

vs.

CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY

JOHN F. FINERTY,
Counsel for Appellant, Hudson & Manhattan Railroad Company.

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

INDEX

	PAGE
Introduction	1
Opinions Below	3
Jurisdiction	3
Statutes Involved	4
Statement of the Case	5
History of the proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943	7
(1) Prior proceedings before the Commission and the Courts, 1937-1942	7
(2) Proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943	10
(a) Proceedings before the Commission resulting in the order of June 8, 1943	10
(b) Proceedings before the Commission resulting in the order of August 3, 1943, modifying the order of June 8, 1943	12
(c) Proceedings before the District Court in relation to the order of August 3, 1943	19
(d) Further proceedings before the Commission resulting in the order of November 2, 1943, affirming modification of the order of June 8, 1943, by order of August 3, 1943	21
(e) Proceedings before the District Court in relation to the orders of June 8, 1943, and November 2, 1943	33
(f) Rulings below	35
Specification of Assigned Errors Intended to be Urged	39
Summary of Argument	40

ARGUMENT

PAGE

I. The injunction issued by the District Court against the Commission's orders of June 8, 1943, and November 2, 1943, on the wholly specious ground that such orders deprived the appellees of a full and fair hearing, was an unjustifiable interference with the Commission's attempt, in a proper exercise of its administrative discretion, to correct its own error 46

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare..... 50

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.. 52

II. Appellees' tendered evidence was irrelevant and incompetent for the express and sole purpose for which it was tendered..... 56

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The

PAGE

District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return 61

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized 67

III. Jersey City was estopped both from asking the Commission to receive the tendered evidence and from seeking and obtaining an injunction from the District Court based on the Commission's refusal to receive such evidence.

Interwoven with, and in reality a part of such estoppel, was Jersey City's total failure to exhaust its administrative remedies before the Commission 73

IV. The Price Administrator, having not only failed to offer any evidence whatever before the Commission that the increased fares authorized by the enjoined orders would result in inflation, but having expressly conceded to the contrary, the Commission's refusal to receive the evidence tendered by the Price Administrator, to show that because of appellant's increased 1943 revenues the Commission was not warranted in permitting any increase whatever over appellant's present 8 cent fare, could not constitute a denial of full and fair hearing to the Price Administrator, or warrant the District Court on that ground in enjoining the Commission's orders.

PAGE

The District Court was likewise unwarranted in enjoining the Commission's orders on the ground that the Commission had "lightly brushed aside" the contention of the Price Administrator that the increased fares thereby authorized violated the national emergency policy of economic stabilization 82

V. The Commission's orders of June 8, 1943, and November 2, 1943, are fully supported by the findings of the Commission which, in turn, are fully supported by substantial evidence in the record 88

A. The report and order of June 8, 1943 91

B. The report and order of November 2, 1943 .. 96

Conclusion 107

APPENDIX 1

Interstate Commerce Act i

Emergency Price Control Act of 1942 ii

Inflation Control Act (Stabilization Act) of 1942 iii

Interstate Commerce Commission, Rules of General Practice, Rule 101 iv

APPENDIX 2

Description of Appellant's Railroad vi

TABLE OF CASES

PAGE

Acker v. *United States*, 298 U. S. 426, 433 ..... 55, 108
American Toll Bridge Co. v. *Railroad Commission*, 307 U. S. 486, 494 51
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248 55

Baltimore and Ohio R. Co. v. *United States*, 298 U. S. 349, 389 55
Board of Public Utility Commissioners of N. J. v. *U. S.*, 21 F. Supp. 543 77

Dayton Power & Light Co. v. *Public Utilities Commission*, 292 U. S. 290, 299 55

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-3 51
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 615 ..... 55, 91, 108
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575 55
Florida v. *United States*, 282 U. S. 194, 215 89

Hudson & Manhattan Railroad Co. v. *United States et al.*, 313 U. S. 98 ..... 3, 9, 89, 103
Hudson & Manhattan Railroad Co. v. *United States et al.*, 33 Fed. Supp. 495 ..... 3, 9

Illinois Commerce Commission v. *United States*, 292 U. S. 474, 481 55
Increased Railway Rates, Fares, and Charges, 1942, 248 I. C. C. 545 95
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92 89
Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U. S. 541, 546, 547-548, 550 ..... 88, 90

PAGE

Lindheimer v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164 55
Local Fares of the Hudson & Manhattan Railroad Company, 58 I. C. C. 270..... 8
Los Angeles Gas & Electric Corp. v. *Railroad Commission*, 289 U. S. 287, 307, 310, 311, 319..... 55

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457, 482 49
Myers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51..... 76

Passenger Fares of Hudson & Manhattan Railroad, 227 I. C. C. 741.....2, 3, 8
Passenger Fares of Hudson & Manhattan Railroad, 255 I. C. C. 649..... 1, 3
Passenger Fares of Hudson & Manhattan Railroad, 256 I. C. C. 507..... 1, 3
Passenger Fares and Surcharges, 214 I. C. C. 174, 257 18
Philadelphia Coke Company v. *Bowles*, United States Emergency Court of Appeals, December 15, 1943.. 37
Pittsburgh Plate Glass Company v. *N. L. R. B.*, 313 U. S. 146, 163..... 56
Public Service Commission of Montana v. *Great Northern Utilities Company*, 289 U. S. 130..... 63

Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 397, 398..... 55

United States v. *New River Co.*, 265 U. S. 533, 542.. 88
United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494 55

Vinson et al. v. *Washington Gas Light Company et al.*, U. S. , decided March 27, 1944.....37, 84
Virginian Ry. Co. v. *United States*, 272 U. S. 658, 666 88

PAGE

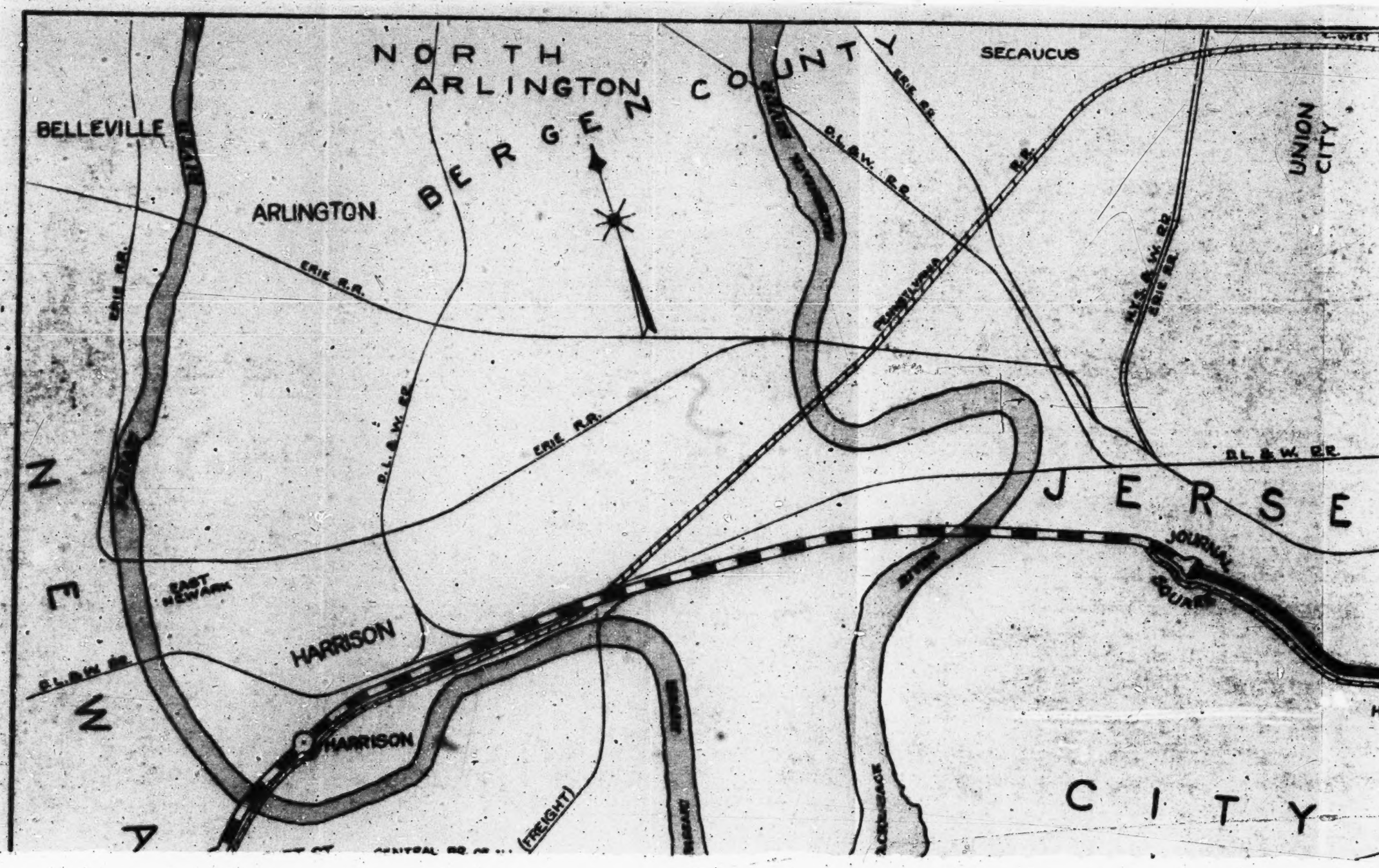
Washington Gas Light Company v. *Byrnes*, 137 F. (2d) 547 37
Western Chemical Co. v. *United States*, 271 U. S. 268, 271 88

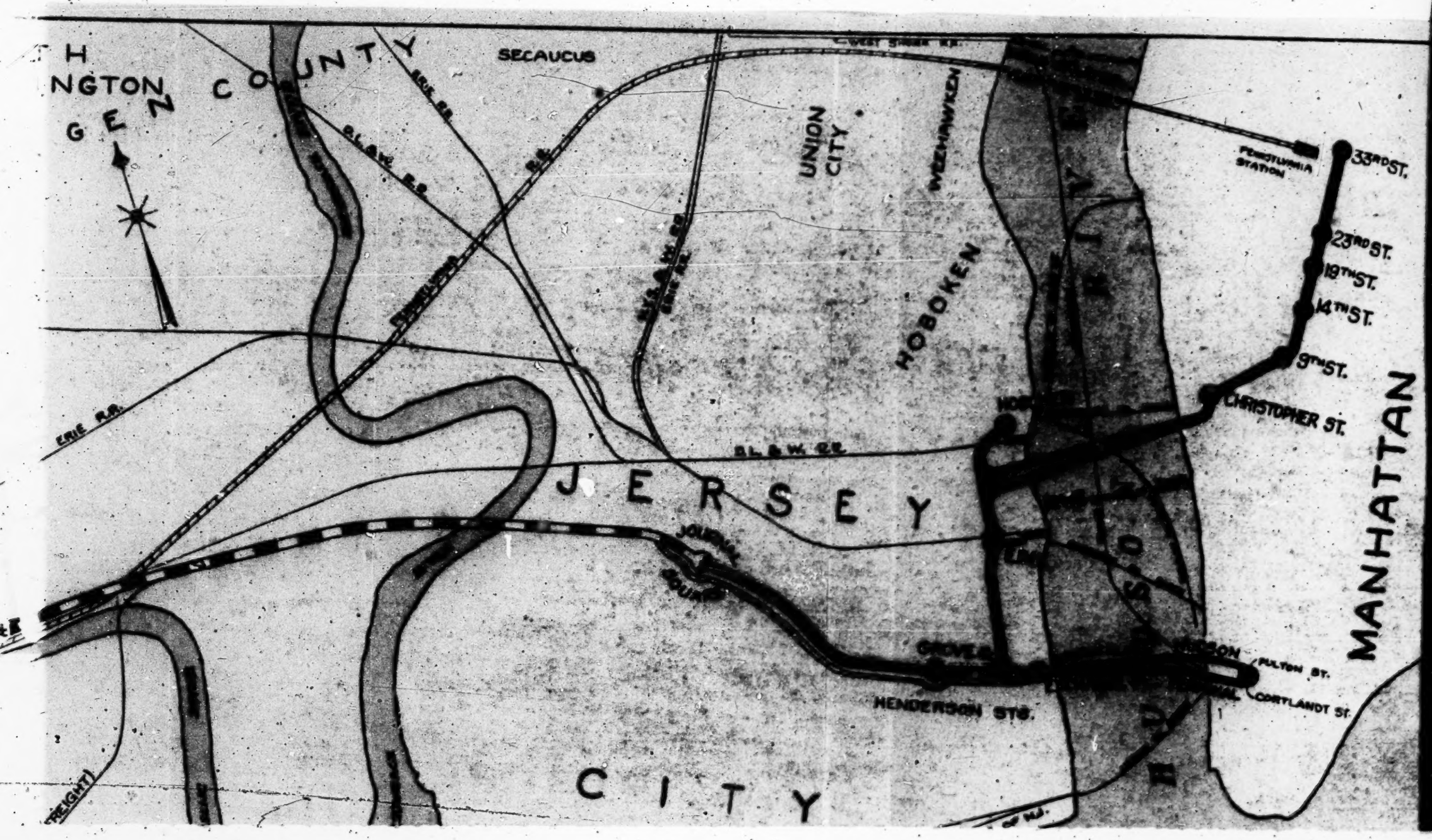
STATUTES INVOLVED

Interstate Commerce Act 4
Emergency Price Control Act of 1942 5
Inflation Control Act (Stabilization Act) of 1942 ... 5

OTHER AUTHORITY

Interstate Commerce Commission, General Rules of Practice, Rule 101 ..... 14, 16, 24, 26, 36, 54, 61, 75


NORTH ARLINGTON
BERGEN COUNTY
SECAUCUS
BELLEVILLE
ARLINGTON
UNION CITY
ERIE R.R.
D.L.&W. R.R.
PENNSYLVANIA R.R.
N.Y.S.&W. R.R.
JERSE
CITY
JOURNAL SQUARE
EAST NEWARK
HARRISON
HARRISON
(FREIGHT)
NEWA


H
NGTON
GEN
COUNTY
SECAUCUS
ERIE R.R.
D.L.&W. R.R.
P.R.R.
UNION CITY
WEEHAWKEN
HOBOKEN
WEST SHORE R.R.
ERIE R.R.
D.L.&W. R.R.
PENNSYLVANIA STATION
33RD ST.
23RD ST.
19TH ST.
14TH ST.
9TH ST.
CHRISTOPHER ST.
HUDSON
TUBES
MANHATTAN
ERIE R.R.
D.L.&W. R.R.
JERSEY
JOURNAL SQUARE
GROVE ST.
HENDERSON STS.
FULTON ST.
CORTLANDT ST.
CITY
HUDSON
TUBES
FREIGHT

Supreme Court of the United States

OCTOBER TERM, 1943

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY, *Appellants,* vs. CITY OF JERSEY CITY and FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellees.*[1]	No. 767

BRIEF FOR APPELLANT HUDSON & MANHATTAN RAILROAD COMPANY

This is a joint appeal by the Interstate Commerce Commission and the Hudson & Manhattan Railroad Company from a final order and decree of the District Court of the United States for the District of New Jersey entered January 14, 1944, setting aside, annulling and perpetually enjoining two orders of the Interstate Commerce Commission of June 8, 1943 and November 2, 1943, respectively, in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan Railroad* (255 I. C. C. 649; 256 I. C. C. 507), insofar as said orders permitted the establishment of a local interstate fare in excess of 8 cents for transportation

[1]The appellees will herein be referred to respectively as "Jersey City" and as the "Price Administrator".

on the downtown line of appellant Hudson & Manhattan Railroad Company, and further ordering and decreeing that such proceedings be remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the District Court.

The Commission's enjoined order of June 8, 1943[1] authorized appellant Hudson & Manhattan Railroad Company to charge, as a maximum, a 9 cent fare on its downtown line instead of the present 8 cent fare authorized by the Commission's order of July 11, 1938 (227 I. C. C. 741).[2]

The Commission's enjoined order of November 2, 1943[3] authorized said appellant to charge as a maximum, in lieu of the 9 cent fare previously authorized, alternative fares of 11 tokens for a $1 or a cash fare of a dime, provided, however, that such alternative fares should also be made applicable to said appellant's uptown line, upon which the authorized and existing fare was and is 10 cents. This order was expressly made by the Commission as the only practical means of correcting its frankly acknowledged error in overlooking evidence already before it prior to its order of June 8, 1943, that it would be impracticable for appellant to collect a 9 cent *cash* fare because of the physical limitations, which could not be obviated, of appellant's fare collection boxes.

Both orders limited such increased fares to the duration of the war and six months thereafter.

Said District Court, prior to its order here appealed from granting a permanent injunction against the Com-

---

[1]R. 248-272.
[2]R. 286-312.
[3]R. 272-285.

mission's orders, had, on November 26, 1943, granted an interlocutory injunction against such orders.[1] A separate appeal by the appellant Hudson & Manhattan Railroad Company from the order granting this interlocutory injunction was taken to this Court as No. 766, October Term, 1943, and was dismissed by the order of this Court of April 3, 1944.

OPINIONS BELOW

The majority[2] and minority[3] opinions of the Court below were rendered January 14, 1944, but have not yet been officially reported.

The enjoined reports and orders of the Interstate Commerce Commission of June 8, 1943 and November 2, 1943 are respectively reported in 255 I. C. C. 649 and 256 I. C. C. 507.

The present 8 cent fare on appellant's downtown line was before this Court in *Hudson & Manhattan Railroad Co.* v. *United States et al.*, 313 U. S. 98, in which this Court affirmed the dismissal by the District Court (33 Fed. Supp. 495) of appellant Railroad Company's application for a permanent injunction against the Commission's order of July 11, 1938 (227 I. C. C. 741) limiting appellant to such 8 cent fare instead of the 10 cent fare published by appellant and suspended by the Commission.

JURISDICTION

This being an appeal from a decree and order of a statutory court permanently enjoining orders of the Inter-

[1] R. 116-118.
[2] R. 194-201.
[3] R. 201-205.

state Commerce Commission, the jurisdiction of this Court is invoked under:

U. S. C. Title 28, Section 47a [Act of March 3, 1911, c. 231, Sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 41(28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C. Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

U. S. C. Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C. Title 28, Section 345 [Act of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Sec. 2, 38 Stat. 804, February 13, 1925, c. 229, Sec. 1, 43 Stat. 938].

STATUTES INVOLVED

No question is involved of the validity of a statute of a state or of a statute or treaty of the United States. There is, however, involved the construction of the following statutes of the United States, applicable provisions of which are set forth in Appendix 1:

Interstate Commerce Act (Sections 1(1), 1(5) and 15a, Title 49, Chapter 1, U. S. C.).

Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 *et seq.*).

Inflation Control Act (Stabilization Act) of 1942 (Act Oct. 2, 1942, Title 50, U. S. C., Secs. 961 *et seq.*).

STATEMENT OF THE CASE

The majority below, by basing their injunction on a wholly specious finding that the Commission has denied appellees a full and fair hearing, have in reality undertaken to prevent the Commission from exercising its proper administrative discretion in two respects:

First: By holding that the Commission could not correct its frankly acknowledged error in its order of June 8, 1943 in limiting the increase in appellant's existing 8 cent fare to an uncollectible 9 cent *cash* fare, by granting on its own motion a further hearing confined solely to the receipt of evidence as to the necessity for and the manner of correcting such error, without reopening the whole question of appellant's right to any increase whatever in its present 8 cent fare and receiving evidence tendered by appellees in this respect.

Second: By holding that the Commission could not, on consideration of a tardy petition for still further hearing to receive such tendered evidence, determine whether such evidence, if received, would require any change in the Commission's prior orders authorizing increases in appellant's present 8 cent fare and, having determined to the contrary, still could not deny a further hearing to receive such evidence even though its receipt would be entirely futile.

This specious finding of a denial of a full and fair hearing is the first and major ground stated in the majority opinion for its improvident injunction, preventing the Com-

mission from correcting its acknowledged error, and thereby depriving appellant of needed revenues in excess of $1,000 per day which, but for the Commission's error and the injunction preventing its correction, appellant would have received since July, 1943.

The only other ground stated by the majority is equally specious. It is that the Commission, in making its enjoined orders authorizing such increased fares "lightly brushed aside" the contention of the Price Administrator that such increased fares violated the national emergency policy of economic stabilization. It will later be shown that although the Price Administrator had neither introduced nor attempted to introduce before the Commission a word of evidence in this respect, the Commission not only considered but elaborately discussed such contention of the Price Administrator.

Essentially frivolous as are both these grounds, they necessitate, nevertheless, a somewhat lengthy analysis of the record[1] relating to the proceedings before the Commis-

---

[1]In order to permit this appeal to be heard at the current term of this Court, the parties stipulated (R. 417-433) to omit from the printed Transcript of Record before this Court certain of the documents transmitted to this Court as part of the original record before the District Court, including the transcript of the proceedings before the Interstate Commerce Commission involved on this appeal, introduced as Exhibit P-1 at the hearings before the District Court, and certain other exhibits introduced at such hearings before the District Court. Such transcript of proceedings before the Interstate Commerce Commission (Exhibit P-1 at the hearings before the District Court) comprises, in addition to the transcript of the stenographic notes of the hearings held before the Commission, various exhibits filed at said hearings. In this brief references to the printed Transcript of Record on the present appeal are designated as "R. ", references to the transcript of the stenographic notes of the hearings held before the Interstate Commerce Commission are designated as "Tr. ", refer-

sion and the courts. Such analysis is necessary for two reasons: first, to make clear that the Commission's enjoined orders were made by it only after full and extensive hearings, including the introduction by all parties of elaborate evidence, the filing of briefs, the consideration of exceptions, and the making of oral argument; second, to make clear the basis on which appellant submits that the appellees were without standing to obtain injunctive relief, by reason *inter alia* of certain estoppels arising against them, interwoven with their failure to exhaust their administrative remedies.

History of the proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943.

(A map of appellant's railroad appears opposite page 1 of this brief. To avoid obscuring the analysis of the record with relation to the basic questions involved on this appeal, the description of appellant's railroad and of its transportation services is deferred to Appendix 2.)

(1) Prior proceedings before the Commission and the Courts, 1937-1942

On July 31, 1937, appellant published and filed with the Commission its local passenger tariff I. C. C. No. 42, to

---

ences to the exhibits filed at the hearings before the Interstate Commerce Commission are designated as "Tr. Ex. ", and references to the exhibits introduced at the hearings before the District Court which are not included in the printed Transcript of Record are designated as "Ex. P. ", in the case of exhibits introduced by Jersey City, as "Int. Ex. ", in the case of exhibits introduced by the Price Administrator, as "H. & M. Ex. D. ", in the case of exhibits introduced by the appellant, and as "I. C. C. Ex. D. ", in the case of exhibits introduced by the Interstate Commerce Commission.

become effective September 1, 1937, establishing a 10 cent fare for the interstate transportation of passengers on appellant's downtown line, in lieu of its then fare of 6 cents which had been authorized by the Commission's report and order of August 9, 1920, in *Local fares of the Hudson & Manhattan Railroad Company,* 58 I. C. C. 270. On the petition of Jersey City and other protestants, the Commission suspended such 10 cent fare in Investigation and Suspension Docket No. 4394.[1]

On July 11, 1938, the Commission issued its original report and order in connection with such proposed 10 cent fare (*Passenger Fares of Hudson & Manhattan Railroad,* 227 I. C. C. 741).[2]

The Commission there found that the proposed 10 cent fare would be unreasonable under *Sections 1 and 15a* of the Act, and had not been justified, but that a fare of 8 cents had been justified. The principal ground of the Commission's finding was that because of diversion which would result from any increased fare due to the competition from other forms of transportation, appellant would earn more under an 8 cent fare than under a 10 cent fare. In this respect the Commission estimated that because of such competition appellant would earn $2,260,817 under the prescribed 8 cent fare, which was approximately $541,000 less than its then current bond interest.[3]

Commissioners Miller and Mahaffie dissented, and Commissioner Eastman did not participate. Commissioner Miller stated:

---

[1]R. 286-287.
[2]R. 286-312.
[3]R. 310-311, 256.

"I dissent from the finding of the majority that the proposed fare of 10 cents has not been justified. The record leaves no doubt in my mind that this fare would be reasonable and lawful for the services performed, and that it has, therefore, been amply justified. The majority report leaves me with the impression that this respondent [appellant], which is badly in need of revenue, is denied the right to assess this fare simply because of a fear that it would result in a material diversion of traffic from its line. The respondent is willing, and is entitled, to assume this risk. We have no right to substitute our judgment in this respect for that of the management of the respondent.

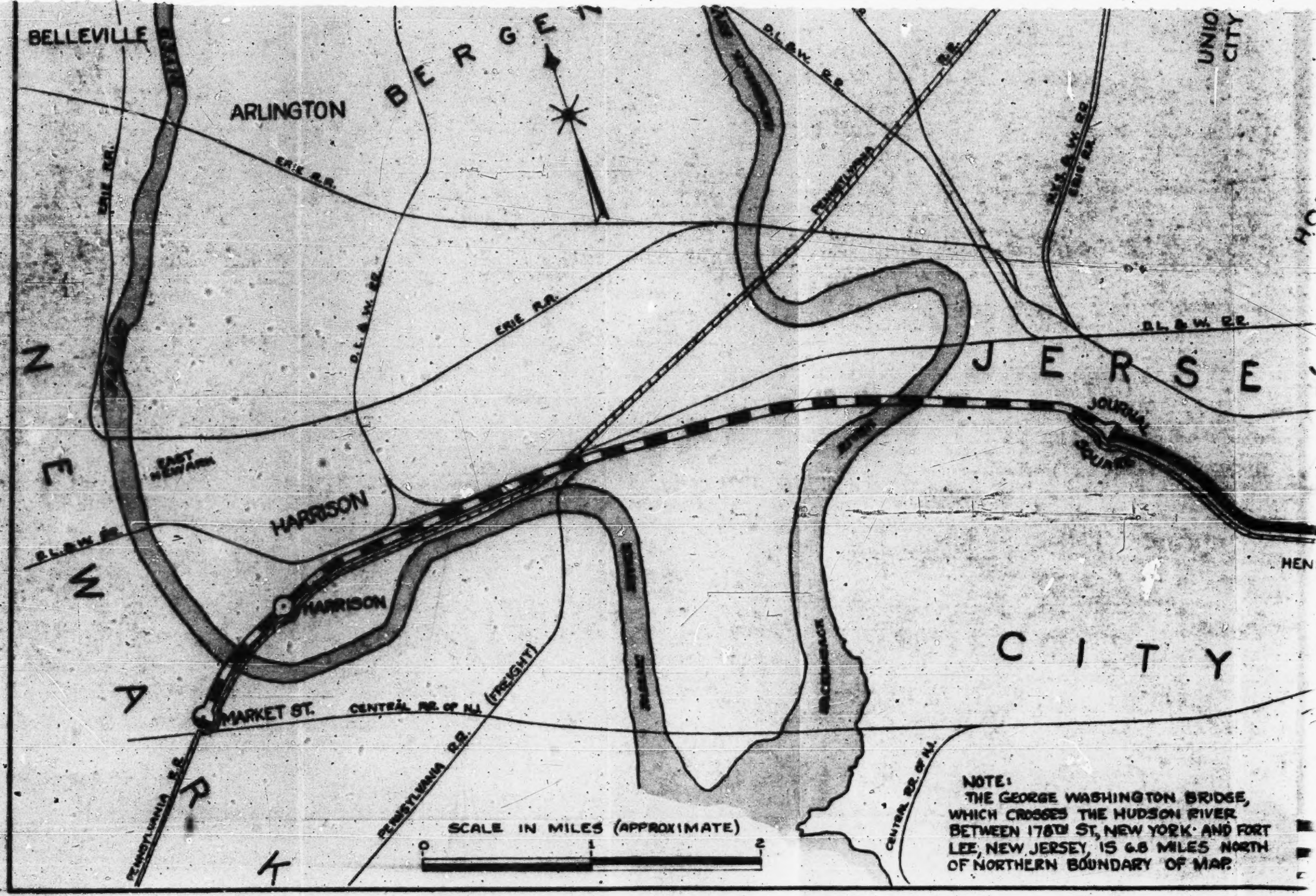
I am authorized to state that Commissioner Mahaffie concurs in this expression."[1]

After the Commission had denied appellant's petition for a rehearing, appellant sought an injunction against the Commission's order limiting appellant to such 8 cent fare before a statutory court of the same District from which this appeal is prosecuted. In an opinion by Judge Fake, the Commission's order was sustained (33 Fed. Supp. 495) on the ground that there was evidence before the Commission to support its findings and order.[2] On appeal to this Court, the order of the District Court was affirmed on April 28, 1941, in a per curiam opinion (313 U. S. 98) on the same ground.

---

[1]R. 311.

[2]Judge Fake dissented from the granting of the instant injunction on this very same ground.


BELLEVILLE
ARLINGTON
BERGEN
UNION CITY
ERIE R.R.
D.L.&W. R.R.
PENNSYLVANIA R.R.
N.Y.S.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
ERIE R.R.
D.L.&W. R.R.
JERSEY
JOURNAL SQUARE
EAST NEWARK
HARRISON
D.L.&W. R.R.
HARRISON
MARKET ST.
CENTRAL RR. OF N.J.
(FREIGHT)
PENNSYLVANIA R.R.
PENNSYLVANIA R.R.
CENTRAL RR. OF N.J.
NEWARK
CITY
HEN
SCALE IN MILES (APPROXIMATE)
0
1
2
NOTE:
THE GEORGE WASHINGTON BRIDGE, WHICH CROSSES THE HUDSON RIVER BETWEEN 178TH ST, NEW YORK AND FORT LEE, NEW JERSEY, IS 6.8 MILES NORTH OF NORTHERN BOUNDARY OF MAP.

ERIE R.R.
HOBOKEN
JERSEY
CITY
MANHATTAN
BROOKLYN
NEW YORK BAY
GOVERNORS ISLAND
CHRISTOPHER ST.
9TH ST.
14TH ST.
19TH ST.
23RD ST.
FULTON ST.
CORTLANDT ST.
HENDERSON STG.
JOURNAL SQUARE
CENTRAL RR. OF N.J.
(FREIGHT)
E IN MILES (APPROXIMATE)
1
2
NOTE:
THE GEORGE WASHINGTON BRIDGE, WHICH CROSSES THE HUDSON RIVER BETWEEN 178TH ST, NEW YORK AND FORT LEE, NEW JERSEY, IS 6.8 MILES NORTH OF NORTHERN BOUNDARY OF MAP.
LEGEND
H. & M. R.R. SYSTEM
PENNSYLVANIA R.R. PORTION OF JOINT SERVICE.
PENNSYLVANIA R.R. OTHER THAN JOINT SERVICE.

(2) Proceedings before the Commission and the Courts in relation to the Commission's enjoined orders of June 8 and November 2, 1943

(a) Proceedings before the Commission resulting in the order of June 8, 1943.

Upon petition of the appellant filed with the Commission June 27, 1942,[1] for reopening of its order of July 11, 1938, alleging fundamentally changed conditions and asking the Commission to reconsider its denial of a 10 cent fare on appellant's downtown line, the Commission reopened the proceedings for further hearing by its order of July 13, 1942.[2] Commencing September 9 and ending September 19, 1942, full and elaborate hearings were held. At these hearings the Price Administrator appeared as intervenor in his own right but, although accorded full opportunity by the Commission to do so, offered no evidence whatever.[3] Immediately following the enactment of the Inflation Control Act of October 2, 1942, the Price Administrator, as representative of the appellee, Director of Economic Stabilization, intervened in such proceedings pursuant to the provisions of said Inflation Control Act,[4] filed a brief with the Commission dated December 14, 1942, but made no request of the Commission to offer any evidence whatever, prior to his motion preceding the Commission's order of November 2, 1943.

On or about January 25, 1943, the Commission's Examiner issued a proposed report recommending that the appel-

---

[1]R. 390-403.
[2]R. 412.
[3]Tr. 1556-7.
[4]R. 409-410, 411-412.

lant be permitted to increase its fare on its downtown line to 10 cents.[1] Both the appellees filed exceptions to this report.[2] In the Price Administrator's exceptions he expressly conceded as to the recommended 10 cent fare,

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."[3]

On April 20, 1943, argument on such proposed report was held before the entire Commission.[4] On such argument, an exhibit was filed at the request of appellees but upon stipulation of the parties, showing appellant's traffic and revenue for the first two months of 1943—the latest figures then available.[5] (On the basis of this exhibit and on a computation of appellant's operating expense based on a formula agreed to by all parties the Commission in its report of June 8, 1943, made an estimate of appellant's probable net revenues available for bond interest for the year 1943).

Thereafter, the Commission made its report, findings and order of June 8, 1943 (one of the two orders here enjoined).[6] The Commission overruled the Examiner's recommendation that appellant be permitted to increase the fare on its downtown line to 10 cents and limited the increase to 9 cents, *although appellant had presented certain evi-*

---

[1]H. & M. Ex. D-8.
[2]H. & M. Ex. D-9 (Exceptions of Jersey City); R. 365-380 (Exceptions of Price Administrator).
[3]R. 378.
[4]Tr. 1929-2031.
[5]R. 410-411, 257, 275.
[6]R. 248-272.

dence that, by reason of the physical limitations of its fare collection boxes, which limitations could not be obviated, *it would be impracticable to collect a 9 cent cash fare.*[1] The Commission's order expressly limited the increased fare of 9 cents to the period of the war and 6 months thereafter.

Commissioners Miller and Mahaffie again dissented, being joined by Commissioner Patterson, on the ground that the record fully justified appellant's proposed 10 cent fare. Commissioner Miller stated:

> "I concur in the finding of the majority insofar as it gives approval to increasing the present fare to 9 cents. In my dissent to the prior report, 227 I. C. C. 741, I expressed the view that the record there amply justified a finding that the proposed fare of 10 cents would be reasonable and lawful for the services performed by this respondent. Nothing is presented as a result of the further hearing to cause me to change that opinion.
>
> Moreover, I see no sufficient reason for here limiting the time during which the 9 cent fare shall remain in effect.
>
> I am authorized to state that Commissioners Mahaffie and Patterson join in this expression."[2]

Commissioner Aitchison did not participate in the disposition of this proceeding.

(b) Proceedings before the Commission resulting in the order of August 3, 1943, modifying the order of June 8, 1943.

On July 8, 1943, appellant filed a sworn petition for reconsideration and modification of the Commission's

---

[1]Tr. 1125-7.
[2]R. 271-272.

findings and order of June 8, 1943.[1] The modification requested was expressly limited to such as might be "necessary merely to permit practicable compliance by petitioner (appellant) with those findings."[2] Otherwise the petition asked no modification of the findings and order of June 8, 1943, authorizing a 9 cent fare.

The petition, after calling the Commission's attention to the fact that the Commission had overlooked evidence already of record as to the physical limitations of appellant's fare boxes which made it impracticable for appellant to collect a 9 cent *cash* fare, set out in greater detail the facts in this respect. Such petition also set out facts showing that the only means of practicable compliance with the Commission's findings and order of June 8, 1943, would be to charge, in place of the uncollectible 9 cent *cash* fare, alternative fares of 11 tokens for $1 or a cash fare of a dime, applicable both to appellant's downtown and uptown lines. The petition showed that although appellant's present fare on its uptown line is 10 cents it would be impracticable to limit such alternative fares to its downtown line, even though the application of such token fares to its uptown line would reduce appellant's revenues from that line. The petition asked that authority be granted to charge such alternative fares as soon as tokens could be obtained and appellant's fare collection boxes modified, and that appellant be authorized in the meantime to charge a straight 10 cent cash fare on its downtown as well as on its uptown line. It also asked the Commission to remove the provision of its prior order limiting such increased fares to the period of the war and

[1] R. 327-336.
[2] R. 327.

six months thereafter. The petition asked that any party to such proceedings who might be opposed to the granting of the petition be required to file a verified reply thereto within ten days; that the Commission upon the basis of such petition and any such replies determine without further hearing the issues thereby presented; and that if such alternative fares were authorized appellant be permitted to publish them on five days' notice. As ground for such procedure, there was attached to the petition an affidavit[1] showing that, since the effective date of the Commission's order of June 8, 1943, appellant had suffered a loss in excess of $1,000 per day because of its inability to collect the authorized 9 cent cash fare, and would continue to lose such amount until the proposed alternative fares should become effective.

Jersey City, without itself filing any petition for reopening or reconsideration of the Commission's order of June 8, 1943, as permitted by the Commission's General Rules of Practice,[2] on July 14, 1943, filed an unverified reply[3] to appellant's petition. That reply alleged *inter alia:*

> "It is the position of protestants that the petition should be denied, that the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by the respondent, that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied."[4]

---

[1]R. 336-345.
[2]See Appendix 1 hereto.
[3]R. 345-351.
[4]R. 350.

Nowhere in such reply was any ground stated as to why "the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended," and the reply mainly consisted of arguments why the Commission should not authorize appellant to charge a straight 10 cent fare pending its ability to obtain tokens and modify its fare collection boxes. Moreover, it will be noted that Jersey City's suggestion that the proceedings should be set for further hearing was made solely "in view of the questions and assertions now brought forth by the respondent (appellant)." These "questions and assertions", it has already been noted, were expressly limited to a request for such modification of the Commission's findings of June 8, 1943, prescribing a 9 cent fare

> "as is necessary merely to permit practicable compliance by petitioner with those findings".[1]

The only ground for such modification was that it was impracticable for appellant to collect a 9 cent *cash* fare. The further hearing suggested in Jersey City's reply must be taken, therefore, as confined to appellant's questions and assertions relating to the necessity for such substitution of alternative fares for a 9 cent *cash* fare. *Nowhere in its reply did Jersey City suggest or ask a further hearing as to the justification for the 9 cent fare itself instead of the existing 8 cent fare.*

The Price Administrator filed a substantially similar reply.[2] In such reply such appellee stated:

> "And in view of Petitioner's tremendously improved current earnings, it is requested that the

[1] R. 327.
[2] R. 352-365.

> Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living."[1]

While the Price Administrator in his reply did rehash the arguments he had advanced before the Commission prior to the Commission's report and order of June 8, 1943, to the effect that because of appellant's increased traffic the Commission should authorize no increase whatever in appellant's present 8 cent fare, that reply specified no new evidence which, if further hearing were granted, the Price Administrator would present in this respect, nor did it suggest that the Price Administrator would offer any evidence to show that the increased fares would result in inflation or increased cost of living, as to which questions, it has been noted, he had previously failed to offer any evidence whatever.

It should be noted that, under the Commission's General Rules of Practice, these statements in the respective replies of the appellees did not constitute petitions for reconsideration or reopening of the Commission's order of June 8, 1943 in either form or substance and, in any event, were filed after the time had expired under those Rules for such a petition.[2]

---

[1]R. 364.

[2]Under Rule 101(e) of the Commission's Rules of Practice, it is provided that any petition for rehearing, further hearing, reconsideration or any other change in a decision or order of the Commission, must be filed within thirty days after the date of the service of such decision or order "granting an application in whole or in part" and within sixty days after the date of service of any other character of decision or order. (See Appendix 1 hereto.)

(cont. on next page)

The Commission on August 3, 1943, issued a report, findings and order[1] based upon appellant's petition and such unverified replies, and without further hearing. *After frankly acknowledging that it had failed to give proper weight to the evidence introduced by appellant prior to the Commission's order of June 8, 1943, showing that it would be impracticable for appellant to collect a 9 cent cash fare,*[2] and also noting that on this account appellant was losing in excess of $1,000 a day of the revenue the Commission had intended to accord appellant by such order,[3] and on a specific finding that it would be impracticable for appellant to collect a 9 cent cash fare,[4] the Commission stated:

> "Under the proposed basis the occasional passenger will pay 10 cents on both of respondent's lines. In the prior report we found that the fares and charges of record for commutation service of carriers other than respondent serving the New York metropolitan area afford stronger support, differences in transportation services considered, for an 8-cent or a 9-cent fare than for a 10-cent fare on respondent's downtown line. That finding; however, was based upon a comparison between fares and services for commutation passengers and not for passengers who may ride only occasionally in commutation equipment. On the railroads generally the latter passengers do not ride on commutation tickets but on standard coach tickets, the price of which is

---

The Commission's order of June 8, 1943, authorizing the enjoined 9 cent fare had been made on the application of appellant for leave to publish and charge a 10 cent fare and, therefore, constituted a grant in part of such application.

[1] R. 313-326.
[2] R. 322.
[3] R. 319.
[4] R. 322.

subject to the minimum charge of 10 cents for all classes of rail passenger equipment approved by us in *Passenger Fares and Surcharges*, 214 I. C. C. 174, 257. *Upon the facts of record as adduced at the several hearings herein, we now find a fare of 10 cents to be reasonable for the occasional local interstate passenger on respondent's downtown line. As stated, for the purposes of this report, we must regard the maximum reasonable local interstate fare on the uptown line to be 11 cents.*"[1]

* * * * *

"Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line." (Italics supplied.)[2]

The Commission, however, denied so much of the appellant's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied appellant the right to charge a 10 cent cash fare on its downtown

---

[1]R. 323.

[2]R. 325-326.

line pending its ability to obtain tokens and to modify its fare collection boxes. Neither did the Commission grant the requested permission to publish the alternative fares on five days' notice. Commissioners Miller, Mahaffie and Patterson again dissented on the ground that on the record before the Commission it should authorize a straight 10 cent fare on the appellant's downtown line.[1] Commissioner Aitchison did not participate.

(c) Proceedings before the District Court in relation to the order of August 3, 1943.

On September 13, 1943, before appellant had undertaken to publish the alternative fares authorized by the order of August 3, 1943, Jersey City, filed its *original* complaint[2] in these proceedings specifically asking that such order be enjoined but only

> "*in so far* as such order permits the establishment of any local interstate fare *in excess of nine cents* for

---

[1]R. 326.

[2]R. 1-19. This *original* complaint was clearly premature. Appellant filed no answer to it, however, because before appellant's time for answer had expired, Jersey City had filed its *amended* complaint. The *original* complaint was premature because the Commission's order of August 3, 1943, authorizing the alternative fares was not self-executing but purely permissive. Before the alternative fares could become effective, it was necessary under that order that the appellant publish and file such fares on the full 30-day statutory notice. Upon such publication, either or both of the appellees could have applied to the Commission under Section 15(7) of the Interstate Commerce Act, for suspension of such alternative fares on the very grounds alleged in Jersey City's original complaint. Therefore, until such fares had been published and suspension asked and denied, resort to the injunctive powers of the courts was premature.

transportation on the downtown line, * * *" (Italics supplied.)[1]

Said original complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> "17. It is apparent that the Commission, in authorizing local downtown fares *in excess of the nine cent fare* stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. *As to such alleged carrier disability the plaintiff* [*Jersey City*] *herein has been deprived of its full day in Court* by not having been given an opportunity to cross-examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered *such matters* in this regard, it acted arbitrarily and beyond the realms of proper judicial procedure." (Italics and matter in brackets supplied.)[2]

Such original complaint raised no question whatever as to the validity of the 9 cent fare authorized by the Commission's order of June 8, 1943, *or as to the increase there involved over the existing 8 cent fare* authorized by the Commission's order of July 11, 1938. On the contrary, such original complaint implicitly and explicitly asked that the Commission and the appellant be required to observe the Commission's order of June 8 prescribing a 9 cent fare.

While the Price Administrator did not formally intervene in such original complaint, his counsel on the subse-

---

[1]R. 10.
[2]R. 7.

quent hearing of September 28, 1943 before the Commission, hereinafter referred to, stated that he did not so intervene because of the Commission's order of September 18, 1943, reopening the proceedings,[1] to which reference will now be made.

(d) Further proceedings before the Commission resulting in the order of November 2, 1943, affirming modification of the order of June 8, 1943, by order of August 3, 1943.

On September 18, 1943, the Commission of its own motion reopened the proceedings for further hearing.[2] The grounds on which it acted and the limitations which it placed on the scope of the reopening are stated in the Commission's report of November 2, 1943, as follows:

> "On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey, seeking to enjoin our action of August 3, 1943, on the ground, among others, that it had been 'deprived of its full day in court by not having been given the opportunity to cross-examine the witnesses, refute and otherwise present counter evidence * * *.' *Accordingly, out of an abundance of caution*, by order of September 18, 1943, we reopened this proceeding for further hearing 'to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943,' and to afford 'any party hereto

[1]Tr. 2201-4.
[2]R. 351-352.

* * * the right to cross-examine adverse witnesses.' (Italics supplied.)[1]

On the further hearing held under the Commission's order of September 18, 1943, appellant offered evidence to show that it was impracticable, because of the physical limitations of its fare collection boxes, which could not be obviated, to collect a cash fare of 9 cents and that the only practicable means of substantial compliance with the Commission's order of June 8, 1943, would be to apply both to the downtown and uptown lines alternative fares of 11 tokens for $1 or a cash fare of one dime, although this would result in reducing appellant's revenue from its uptown line.

Appellant, in order to show that it was losing in excess of $1,000 a day through its inability to collect the authorized 9 cent fare, itself introduced exhibits showing its actual local interstate passenger traffic and revenues for the eight months ended August 31, 1943, and its local interstate passenger traffic and revenues for the eight months ended August 31, 1943, equated to a twelve months' basis.[2]

Jersey City, although it had induced the Commission to reopen its order of August 3, 1943, authorizing the alternative fares, by the allegations of its *original* complaint that it had been denied an opportunity to cross-examine appellant's witnesses and to offer counter-evidence with reference to appellant's disability to collect a 9 cent fare, offered no evidence whatever in this respect on the further hearing of September 28 and 29 under such order of reopening. The only evidence offered by the Price Administrator in this

[1]R. 274.
[2]Tr. Exs. F-148, F-149, F-150.

respect was confined to an effort to prove that appellant's estimate of the potential ratio of use of token fares to cash fares under such alternative fares was erroneous.[1]

Both appellees, however, attempted to offer certain evidence and to develop by cross-examination certain data with reference to the revenues and operating expenses of the appellant for the first seven months of 1943, for the express and sole purpose of showing that appellant was entitled to no increase whatever over its present 8 cent fare on its downtown line, because due to increase in its traffic, appellant, without any increase in its fare, (1) would earn its full current bond interest, (2) would earn "more than" the revenue which the Commission had, in its report of July 11, 1938, estimated appellant would earn under the 8 cent fare authorized by its order of that date, and (3) would earn "more than" the revenue which the Commission had, in its report of June 8, 1943, estimated appellant would earn under the 9 cent fare authorized by its order of that date.[2] Appellees claimed that it was the Commission's intention to limit appellant to such estimated revenues.[3] *Appellees did not tender any evidence or make any offer to prove that appellant would earn a fair return on its railroad properties under its present 8 cent fare or that, under the enjoined fares, appellant would earn more than such a fair return.*

Included in such offered evidence was a condensed corporate income statement of the Hudson & Manhattan Rail-

---

[1]Tr. 2424-41, Tr. Ex. F. 142.
[2]Tr. 2215-29, 2446-50, 2144-51.
[3]Tr. 2149-50, 2449-50.

road Company for the seven months ending July 31, 1943.[1] A similar statement for the five months ending May 31, 1943 had been attached to the reply of the Price Administrator of July 19, 1943 to the appellant's petition of July 8, 1943 for reconsideration and modification of the Commission's findings and order of June 8, 1943.[2] In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of appellant from its railroad operations but was a consolidated statement of the income of the appellant company from all operations, including its Hudson Terminal Buildings and other real estate.[3]

The Examiner rejected such evidence and refused to permit such cross examination as not being within the limitations of the Commission's order of reopening of September 18, 1943, but specifically advised counsel for appellees that if they desired to broaden the issues, they could petition the Commission for a modification of that order for the purpose of receiving the rejected evidence and cross examination.[4] It is particularly to be noted that in so doing the Examiner went beyond the letter of Rule 101 of the Commission's Rules of Practice,[5] since the tendered evidence and cross-examination could have no relevance whatever unless the Commission's order of June 8, 1943 authorizing the 9 cent fare were reopened, and since the time to petition for the reopening of that order had under such Rule long since expired.

---

[1]Tr. 2446-50, R. 66.
[2]R. 364.
[3]R. 324-325.
[4]Tr. 2034-36, 2144-51, 2215-29, 2446-50.
[5]See Appendix 1 hereto.

On October 14, 1943, the Price Administrator filed a petition (entitling it a "motion")[1] for modification of the Commission's order of September 18, 1943,

> "to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen said proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942."[2]

The only specifications in such petition of the purpose of adducing such evidence read as follows:

> "8. Counsel for the protestants stated if given an opportunity to demonstrate by presentation of evidence at the hearing he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year of 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase."[3]

In this motion, as on the further hearing of September 28 and 29, 1943, the Price Administrator made no offer to prove either that under appellant's present 8 cent fare appellant would earn a fair return on the value of its rail-

---

[1]R. 67-70.
[2]R. 70.
[3]R. 69.

road properties, or that under the enjoined fares appellant would earn more than such a fair return.

On October 25, 1943, appellant filed a reply to this petition,[1] pointing out that Jersey City had neither filed an independent petition nor joined in that of the Price Administrator, and alleging that Jersey City's failure so to do was occasioned by Jersey City's recognition that it would stultify Jersey City's *original* complaint then pending before the District Court, which in substance asked that the Commission and appellant be required to abide by the Commission's order of June 8, 1943 authorizing a 9 cent fare on the downtown line. Such reply also pointed out that the Commission, neither by its order of July 11, 1938 nor by its order of June 8, 1943, had undertaken to limit the revenue which appellant might earn under the 8 cent and 9 cent fares therein respectively authorized, but had merely estimated what revenue appellant might earn under such fares in view of existing competition of other forms of transportation; further, that appellant plainly was not limited by law to earning merely its current interest on its bonds.

By a letter to the Commission[2] dated October 25, 1943, counsel for Jersey City purported to

> "adopt and otherwise ratify the contents of the aforesaid (Price Administrator's) petition as though it were our own."

This letter did not comply with the Commission's General Rules of Practice either as to form, content, or time of serv-

---

[1]R. 380-389.

[2]R. 389-390.

ice of petitions for reconsideration, reopening, further hearing or other modification of an order, and consequently was not treated as constituting such a petition by the Commission in its report of November 2, 1943.

On November 2, 1943, the Commission issued its report and order[1] which the District Court has enjoined.

The Commission's report, after reciting, as already quoted, that it had issued its order of reopening of September 18, 1943 "out of an abundance of caution" stated, with reference to the further hearing held on September 28 and 29 under that order:

> "At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion, filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding 'for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942,' called the Stabilization Act. To this motion respondent replied. Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earn-

[1] R. 272-285.

ings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted."[1]

The Commission then stated:

"In the complaint of the City of Jersey City before the District Court [*i.e.* the *original* complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to 9½ cents." (Matter in brackets supplied.)[2]

The Commission further stated:

"At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. *Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected*

[1] R. 274-275.
[2] R. 275.

to yield materially better revenue results to respondent than we anticipated at the time of the second report [*i.e.*, the report of June 8, 1943]. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled." (Italics and matter in brackets supplied.)[1]

Further in this connection, the Commission stated:

"Based upon the number of local interstate passengers carried by respondent in the first 8 months of 1943, adjusted to a 12-month basis[2] and assuming a 5 percent loss in the downtown local passengers by reason of an increase in the fare, the proposed alternative basis can be expected to bring to respondent at least no greater gross or net revenue than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible, as contemplated by our findings in the second report. If such estimate were based upon a use ratio of 90 percent tokens and 10 percent dimes, as respondent claims it should be, the result would approximate $85,000 less annual revenue under the alternative basis than under the 10-cent and 9-cent cash fares."[3]

Having reached these conclusions, the Commission then made the following findings of fact, which it underscored in its report, stating under each finding the evidence of record upon which such finding was based. For the sake of brevity such statements of the evidence underlying such

[1] R. 275.

[2] As shown by appellant's exhibits Tr. Exs. F-148, F-149 and F-150, referred to above, introduced at the hearings of September 28 and 29, 1943.

[3] R. 279.

findings are here omitted. The findings themselves are as follows:

> "Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:
>
> 1. It is impracticable for respondent to collect a cash fare of 9 cents.[1]
>
> 2. There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.[2]
>
> 3. The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable.[3]
>
> 4. The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report [*i.e.* June 8, 1943] as necessary to insure adequate transportation service.[4]
>
> 5. The modification of our prior findings as made in the third report of August 3, 1943, is not

---

[1] R. 276.
[2] R. 277.
[3] R. 278.
[4] R. 278.

in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.[1]

6. A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.[2]

The Commission then stated:

"Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we affirm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and maintenance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.

Respondent asks for permission to establish the fares herein approved upon 10 days' notice to us and to the public, instead of 30 days as required in section 6(3) of the act. A downtown fare of 9 cents was approved by us on June 8, 1943, and in the ordinary course, if collectible, that fare would now have been in effect for about 4 months. Accordingly, we feel warranted in exercising the powers given to us in section 6(3) and permitting the establishment of the approved fares upon less than the statutory notice.

[1] R. 282.
[2] R. 283.

> An order overruling the aforesaid motion of the Director of Economic Stabilization, and granting permission to respondent to establish the fares herein approved upon not less than 15 days' notice, will issue." (Italics supplied.)[1]

Commissioners Miller, Mahaffie and Patterson reiterated their view, previously expressed in connection with the Commission's reports and orders of June 8, 1943, and August 3, 1943, that the Commission should have authorized appellant to charge a straight 10 cent fare on its downtown line.[2] Commissioner Aitchison again did not participate.

On November 6, 1943, appellant filed with the Commission its local passenger tariff No. 53, effective November 22, 1943, publishing alternative interstate fares of 11 tokens for $1 or a cash fare of a dime, applicable both to appellant's downtown and uptown line.[3]

---

[1]R. 283-284.

[2]R. 284.

[3]On the request of the District Court and with the permission of the Commission, appellant voluntarily postponed the effective date of its tariff to November 29, 1943. On the issuance by the District Court of its interlocutory injunction herein on November 26, 1943, appellant with the Commission's permission and pursuant to the terms of such injunction further postponed the effective date of its tariff to January 16, 1944. On the issuance of the permanent injunction herein on January 14, 1944, appellant, pursuant to the terms of such injunction, cancelled its tariff publishing alternative fares, thereby leaving in effect its present 8 cent fare on its downtown and its present 10 cent fare on its uptown line.

(e) Proceedings before the District Court in relation to the orders of June 8, 1943, and November 2, 1943.

On November 18, 1943, Jersey City filed its *amended* complaint herein[1] asking that the Commission's orders of June 8, 1943, and November 2, 1943, be perpetually set aside, annulled and enjoined in so far as such orders permitted any fare on appellant's downtown line in excess of 8 cents (the fare authorized by the Commission's order of June 11, 1938).

The only allegations of the amended complaint to which it is here necessary to refer are those to which the majority below alone referred, and on which primarily the majority below have sought to justify the injunction granted on the basis of such amended complaint. Those allegations were that the Commission had denied Jersey City a full and fair hearing by repeatedly refusing to receive evidence and permit cross-examination by Jersey City to show that by reason of appellant's increased revenues in 1943 due to increased traffic, no increase over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938 was justified. The remaining allegations of the amended complaint are so frivolous that they were ignored by the majority below and will be ignored here.

The Price Administrator filed a petition of intervention under Jersey City's amended complaint,[2] making similar allegations and asking similar relief, but in addition alleging that the Commission's orders in permitting an increase over the 8 cent fare in effect on appellant's

[1] R. 25-54.
[2] R. 55-65.

downtown line on September 15, 1942 (*i.e.* the fare authorized by the Commission's order of June 11, 1938) were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942.

The United States of America was named as a defendant in both the amended complaint and the petition of intervention, but filed a neutral answer[1] on the ground that a question of the relative powers of two agencies of the government was involved.

The appellants filed their respective answers to the amended complaint and to the petition of intervention.[2] Said answers, in substance, admitted the making of the orders of June 8, 1943 and November 2, 1943; denied that appellees were not accorded a full and fair hearing; denied that said orders contravened either the Emergency Price Control Act or the Stabilization (Inflation Control) Act; and alleged that said orders were made after a full hearing and consideration of the evidence and argument of all parties and were fully supported by evidence before the Commission and by the Commission's findings based on such evidence.

In addition, the appellant carrier in its answers, and the Interstate Commerce Commission in its amended answer, alleged that neither of the appellees had exhausted its administrative remedies before the Commission; moreover, that appellees were estopped from seeking an injunction

---

[1]R. 92-93.

[2]Answer of Interstate Commerce Commission to amended complaint, R. 88-92; answer of Interstate Commerce Commission to petition of Price Administrator, R. 98-100; amended answer of Interstate Commerce Commission to amended complaint and to petition of Price Administrator, R. 101; answer of appellant to amended complaint, R. 71-88; answer of appellant to petition of Price Administrator, R. 93-98.

against the Commission's orders of June 8, 1943, and November 2, 1943 for the reasons set forth under Point III of the Argument herein.

(f) Rulings below.

Both appellees applied for an interlocutory injunction, which was granted November 26, 1943.[1]

Final hearing was had on December 14, 1943. On January 12, 1944, the majority of the court below, Judges McLaughlin and Meaney, granted the final order and decree,[2] Judge Fake dissenting.

The opinion of the majority[3] disposed of the matters involved under two headings (1) "Full and Fair Hearing", and (2) "Economic Stabilization." It stated that in view of the conclusions which it reached under these headings "there is no necessity for discussing the other points raised by the plaintiff and intervenor."

Under the heading "Full and Fair Hearing", the majority held:

First, that the enjoined orders of the Commission were based on Section 15 (1) of the Interstate Commerce Act,[4] although neither of the enjoined orders so stated, and although the original order of July 11, 1938, to which they were amendatory, was expressly based on both Section 1 and Section 15a of the Act.[5]

---

[1]R. 116-118.
[2]R. 218-220.
[3]R. 194-201.
[4]The majority presumably meant to refer to Section 15a—the so-called "revenue section" of the Act.
[5]R. 311.

Second, that both the appellees had been denied a full and fair hearing by reason of the Commission's refusal to reopen the proceedings to receive evidence relating to the 1943 earnings of appellant "for the purpose of showing that, under such earnings, no increase in fare whatsoever was justified."

Third, that both appellees had exhausted their administrative remedies. Here the Court ignored the fact that neither Jersey City nor the Price Administrator had ever within the Commission's Rules of Practice filed any petition for reopening, rehearing or reconsideration of the Commission's orders of June 8, 1943, and August 3, 1943, and that only the Price Administrator had petitioned for modification of the Commission's order of September 18, 1943.

Fourth, the Court made no reference to the issue of estoppel, except to say:

> "We do not see that the contentions raised by the defendants that the plaintiffs are estopped from questioning the validity of the orders of June 8, 1943, and November 2, 1943; and that the action is prematurely brought, are answers to the above." [*i.e.*, denial of full hearing.][1]

Apparently the majority confused the question of estoppel with the question of failure to exhaust administrative remedies. See the Court's finding of fact No. 30.[2]

Under the heading "Economic Stabilization" the majority held that the Commission had not given sufficient consideration to the importance of this issue. It quoted only the Commission's conclusion with respect thereto in

---

[1]R. 198.
[2]R. 216.

its report of June 8, 1943; omitted any reference to the fact shown by the Commission's report that the Price Administrator had presented no evidence whatever; omitted all reference to the Price Administrator's express admission that the proposed increase in fare would not of itself result in inflation; and omitted any reference to the Commission's lengthy discussion in that report of the Price Administrator's contentions in this respect in his exceptions and briefs. The majority based its ruling that the Commission had not sufficiently considered this question solely on the case of *Philadelphia Coke Company* v. *Bowles*, United States Emergency Court of Appeals, December 15, 1943. The majority ignored, without mention, the decision of the Court of Appeals for the District of Columbia in *Washington Gas Light Company* v. *Byrnes*, 137 F. (2d) 547, which both appellants had cited to the District Court, and which this Court has since affirmed.[1]

Finally, neither in its opinion, findings of fact, nor conclusions of law, did the majority find that the Commission's orders of June 8, 1943, and November 2, 1943, were without evidence to support them, or that had the evidence which the Commission rejected been received, the Commission must, as a matter of law, have ignored all the other evidence before it, which other evidence even the appellees do not contend would otherwise have been insufficient to support the enjoined orders.

Judge Fake dissented[2] on five grounds:

First, that there was ample evidence to sustain the Commission's orders;

---

[1] *Sub nomine Vinson* v. *Washington Gas Light Company*, U. S. , decided March 27, 1944.

[2] R. 201-205.

Second, that whether the excluded evidence would have changed the Commission's conclusions was a question for the Commission and not the Court to determine since there otherwise was evidence to sustain those conclusions;

Third, that the majority opinion invaded the province of the Commission in undertaking to determine when the Commission might in its discretion close a record;

Fourth, that the Commission had properly exercised such discretion in this case; and

Fifth, that the majority opinion also undertook to invade the province of the Commission in considering the subject of inflation, the determination of which, Judge Fake pointed out, the very Executive Orders quoted by the majority recognized as remaining with the Commission.

The questions presented by this appeal are substantial. Aside from the serious effect of the injunction upon the revenues of the appellant Hudson & Manhattan Railroad Company, the decision of the lower Court, if allowed to stand, would establish principles which would have far-reaching effects in permitting the Director of Economic Stabilization and the Price Administrator to impinge upon the jurisdiction of the Commission. In this respect, the appeal involves the first case respecting the effect of the Emergency Price Control Act and of the Inflation Control Act on the administration by the Interstate Commerce Commission of its powers and duties under the Interstate Commerce Act to prescribe just and reasonable rates. Moreover, it involves the important question whether the Interstate Commerce Commission may be deprived of the power effectively to correct its own acknowledged error through

denial of its right to determine as an administrative matter when a record involving continually changing economic conditions may properly be closed.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant will rely on all errors assigned in its Assignment of Errors dated February 9, 1944,[1] but it is here intended to urge particularly assigned errors numbers I, IV, VI, IX, X, XII, XIII, XV, XVIII, XIX, XX, XXI, XXII, XXIII, XXV, XXVIII and XXXVII-B. These assigned errors, however, will not be here set out in order to avoid unnecessary protraction of this brief and because they are in substance indicated in the Summary of Argument herein contained.

---

[1] R. 221-234.

SUMMARY OF ARGUMENT

I

The injunction appealed from, though granted on a wholly specious finding by the majority below that the Commission had denied appellees a full and fair hearing, constitutes in reality an unjustifiable interference by the District Court with the Commission's proper exercise of its administrative discretion to determine the necessity for, and the manner of, correcting the Commission's acknowledged error in limiting the increase authorized by its order of June 8, 1943 in appellant's existing 8 cent fare on its downtown line to an uncollectible 9 cent *cash* fare.

II

Such injunction constitutes a further unjustifiable interference by the District Court with the Commission's proper exercise of its administrative discretion, pursuant to which the Commission undertook to limit a further hearing, granted on its own motion for the purpose of correcting such error, solely to evidence as to the necessity for and the manner of correcting such error, without reopening the whole question of appellant's right to any increase whatever in its present 8 cent fare and receiving evidence tendered by appellees in this respect.

III

The Commission's refusal to reopen the proceedings before it to receive the evidence tendered by the appellees,

based upon the Commission's express finding that if such reopening were granted

> "we have no reason to believe * * * we would feel warranted in modifying our finding as made in the second report"

was not, as the District Court found, arbitrary and unlawful. On the contrary, it was the Commission's duty before reopening the proceedings to determine whether the tendered evidence, if received, would have warranted or required the Commission to disregard all other evidence before it which would have supported its findings and orders, since otherwise it would have been futile to reopen the proceedings to receive the tendered evidence.

IV

The refusal of the Commission further to reopen the proceedings to receive the evidence tendered by appellees, where on such tender the Commission considered that evidence and determined it would not require any change in its prior findings, did not warrant the District Court in enjoining the Commission's orders in the absence of findings by the court either (a) that there was no evidence before the Commission to support its enjoined orders, or (b) that had the tendered evidence been received the Commission must, as a matter of law, have disregarded all other evidence which otherwise would have supported such orders, and must have denied the increased fares thereby authorized.

V

The determination by the Commission as to when a record before it involving continually changing economic

conditions may properly be closed, is necessarily a matter wholly within its sound discretion. Otherwise, the Commission might be prevented from effectively according relief as to administrative matters within its exclusive jurisdiction which require prompt disposition in order to make such relief effective. The District Court here, therefore, was without authority to substitute its judgment in this respect for that of the Commission in the absence of a finding and of the evidence to support such finding, that the Commission had abused its discretion.

VI

The Commission's refusal further to reopen the proceedings to permit appellees to introduce evidence purporting to show that the Commission, because of appellant's increased 1943 traffic, was not justified in permitting appellant any increase over its present 8 cent fare on its downtown line authorized by the Commission's order of July 11, 1938, could not constitute a denial of full and fair hearing, since

(a) the evidence tendered for this purpose was incompetent and irrelevant;

(b) Jersey City was estopped from asking the Commission to receive such evidence; and

(c) the Price Administrator, whether or not similarly estopped, had no standing entitling him to ask the Commission to receive such evidence.

VII

The evidence tendered by appellees was irrelevant and incompetent because

(a) the Commission could not legally have limited appellant to its present 8 cent fare merely because appellant, due to increased 1943 traffic, might, under such fare, earn its current bond interest;

(b) the Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized; and

(c) appellees made no offer to prove, nor did the District Court find, that because of appellant's increased 1943 traffic, appellant would earn a fair return on its railroad properties under its present 8 cent fare, or that appellant would earn more than such a fair return under the enjoined fares.

VIII

The Commission, either under Section 1 or Section 15a of the Act, could not, as appellees erroneously contend the Commission intended to do, legally have limited appellant to such fares as would yield merely appellant's current bond interest, since appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties.

IX

Even had appellees' tendered evidence been relevant and competent for the purpose for which it was tendered, Jersey City was not only estopped from asking the Commission to receive the tendered evidence but was estopped from seek-

ing and obtaining an injunction from the District Court based on the Commission's refusal to receive such evidence.

X

While the rule requiring a party to an administrative proceeding to exhaust administrative remedies before resorting to equity is not inflexible and its application rests in the sound judicial discretion of the court to which request is made for equitable relief, the District Court here abused its discretion in according Jersey City an injunction against the Commission's orders, in view of Jersey City's total failure to exhaust its administrative remedies before the Commission either as to such orders or as to such tendered evidence.

XI

The Price Administrator, as representative of the Director of Economic Stabilization under the provisions of the Inflation Control Act of 1942, had no legal interest either before the Commission or before the District Court in the question whether appellant's increased fares authorized by the Commission's enjoined orders were reasonable or otherwise lawful under the Interstate Commerce Act, unless such increased fares contravened the provisions of the Emergency Price Control Act or of the Inflation Control Act.

XII

Where, prior to the making of its enjoined orders, the Interstate Commerce Commission had accorded appellees bona fide and extensive hearings, including the introduction of evidence, the filing of briefs and the making of oral

argument, the Commission's refusal on further hearing to receive merely certain evidence tendered by appellees, or further to re-open the proceedings to receive such evidence, did not constitute a denial of a full and fair hearing to appellees in contravention either of the Interstate Commerce Act or of the due process clause of the Fifth Amendment, so as to justify the District Court, solely on the ground of such refusal, to enjoin the Commission's orders.

XIII

The determination whether the evidence tendered by appellees and rejected by the Commission had a substantial bearing upon the right of appellant to fares higher than those charged on September 15, 1942, was an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, and as to which the District Court could not substitute its judgment for that of the Commission.

XIV

The determination whether the increased fares authorized by the Commission's enjoined orders violated the economic stabilization program and the efforts of the national government to keep down the cost of living, is an administrative question within the exclusive jurisdiction of the Interstate Commerce Commission, and as to which the District Court could not substitute its judgment for that of the Commission.

XV

The Commission's enjoined orders were supported by adequate findings based on ample evidence.

ARGUMENT

I

THE INJUNCTION ISSUED BY THE DISTRICT COURT AGAINST THE COMMISSION'S ORDERS OF JUNE 8, 1943, AND NOVEMBER 2, 1943, ON THE WHOLLY SPECIOUS GROUND THAT SUCH ORDERS DEPRIVED THE APPELLEES OF A FULL AND FAIR HEARING, WAS AN UNJUSTIFIABLE INTERFERENCE WITH THE COMMISSION'S ATTEMPT, IN A PROPER EXERCISE OF ITS ADMINISTRATIVE DISCRETION, TO CORRECT ITS OWN ERROR.

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare.

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.

The Commission in its report of June 8, 1943, after fully considering the evidence, arguments and briefs of all parties, concluded that appellant was in need of additional revenue beyond that which might be expected from its present fares, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents during the remaining period

of the war and for six months after its termination.[1] In making these findings the Commission, as it later acknowledged,[2] failed to give due weight to evidence of record[3] showing that it would be impracticable for appellant to collect a 9 cent *cash* fare on its downtown line. This oversight was called to the attention of the Commission by appellant's petition of July 8, 1943, for reconsideration and for such modification of the findings and order of June 8, 1943 as might be "necessary merely to permit practicable compliance by petitioner (appellant) with those findings."[4] Based on such petition and on replies thereto filed by appellees, the Commission by its order of August 3, 1943, without further hearing, modified its prior order so as to permit appellant to charge alternative fares of eleven tokens for $1 or a cash fare of a dime on its downtown line, provided that such alternative fares were also made applicable to appellant's uptown line. In this connection the Commission stated:

> "Apparently on the assumption that the local fare to be approved by us in the prior report for future use on the downtown line would be either the present fare of 8 cents or that proposed of 10 cents, none of the parties stressed the evidence of record with respect to the feasibility of collecting a cash fare of 9 cents, *and it is now apparent that we failed to give to that evidence the weight to which it is entitled.* For the reasons hereinbefore recited, we are convinced that the collection of a 9-cent fare in cash would be impracticable.
>
> * * * * * * *

[1] R. 271.
[2] R. 322.
[3] Tr. 1125-7.
[4] R. 327.

> The substitute fare basis now proposed by respondent, however, with the alternative use of 11 tokens for $1 or a cash fare of a dime, has the advantage of being practical in that it can be conveniently used both by the public and by respondent if made applicable contemporaneously on both the downtown and uptown lines. The approximate use ratio of 90 percent tokens and 10 percent dimes which respondent believes will result, and which we may accept as a reasonable estimate, means that practically all of the regular local commuters on respondent's downtown line will use the tokens and thus pay an average fare of *9 1/11 cents, or about the same as we approved in the prior report. In addition, about 90 percent of the uptown local interstate patrons,* which in all will number about 18,774,000 in 1943, *will obtain a reduction in their fare from 10 to 9 1/11 cents."* (Italics supplied.)[1]

Thereafter, on September 13, 1943, Jersey City filed its *original* complaint,[2] seeking to enjoin the Commission's order of August 3, 1943, on the sole ground that Jersey City had been deprived of its full day in court by not having been given an opportunity to cross-examine witnesses and present evidence in respect of the inability of appellant to collect a 9 cent cash fare. On the basis of such complaint, the Commission on its own motion reopened the proceedings, by its order of September 18, 1943,[3] for the purpose of allowing all parties a hearing on this limited issue. The Commission confined the evidence at the reopened hearings to this limited issue and, having fully considered the testimony and briefs of all parties relevant to this issue, issued

---

[1] R. 322.
[2] R. 1-19.
[3] R. 351-352.

its report and order of November 2, 1943,[1] in which the Commission again found that an alternative fare of eleven tokens for $1 or a cash fare of a dime for local interstate passengers, applicable to both the uptown and downtown lines of appellant, was the only practicable method available by which appellant could reasonably be expected to obtain the additional revenues contemplated by the Commission's report of June 8, 1943.

It thus appears that the Commission's order of November 2, 1943, was a bona fide attempt by the Commission, in the exercise of its administrative discretion, to correct the error which it had made in its report of June 8, 1943, in prescribing a 9 cent cash fare on appellant's downtown line, in the face of evidence that it was impracticable for appellant to collect such a 9 cent cash fare. That the Commission has the power to modify its own order to correct an error, without otherwise reopening the proceedings, needs no argument.[2] We submit that the injunction granted by the District Court against the Commission's orders of June 8, 1943 and November 2, 1943, particularly in the absence of any finding by the District Court that such orders were not supported by adequate findings and substantial evidence, was an unjustifiable interference by the District Court with the proper exercise of the Commission's administrative discretion in this respect.

The ironic result of this interference by the District Court with the Commission's attempt to correct its own error has been to deprive appellant of additional revenues of approximately $1,000 a day,[3] which the Commission

[1] R. 272-285.
[2] *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482.
[3] R. 343.

intended to accord appellant by its report and order of June 8, 1943. Consequently, in the period that has elapsed between the time when appellant might have published and filed a tariff establishing a 9 cent fare on its downtown line, on the one hand, or the alternative fares of eleven tokens for $1 or a cash fare of a dime on both its downtown and uptown lines, on the other hand, and April 30, 1944, appellant has irretrievably lost some $300,000 of badly needed revenues. Moreover, appellant will continue to lose approximately $1,000 a day of additional revenue until the injunction thus improvidently issued by the District Court is dissolved.

A. The Commission properly exercised its administrative discretion in limiting the further hearing granted by its order of September 18, 1943 solely to the receipt of evidence as to the impracticability of appellant's collecting a 9 cent cash fare.

The Commission's order of September 18, 1943, reopened the proceedings for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943."[1] Appellant submits that the limitation imposed by the Commission as to the scope of the reopening afforded by such order constituted an appropriate exercise by the Commission of its administrative discretion.

In the first place, the original complaint of Jersey City, which led the Commission, "out of an abundance of

[1]R. 351.

caution",[1] to reopen the proceedings by its order of September 18, 1943, complained only of Jersey City's having been deprived of its day in court in respect of these limited issues.[2] Jersey City could not have been surprised and cannot now object because the reopened hearing was confined solely to the issues specified in the order of September 18, 1943. These issues were the only issues raised by Jersey City's original complaint.

In the second place, the Commission has the power to determine when and if it will reopen a proceeding before it, and, if it grants a reopening, to limit the scope of such reopening. It is as essential in administrative proceedings as it is in proceedings before courts that the scope of the issues be restricted at the outset and the parties be required to confine their arguments to such issues. As this Court has said, administrative agencies have power themselves "to control the range of investigation."[3] The Commission having determined by its order of September 18, 1943 that the only issue as to which it desired to receive further evidence in order to complete the record before it was the practicability of appellant's collecting a 9 cent cash fare, the determination of this question by the Commission is conclusive and cannot be reviewed by the courts.[4]

---

[1]R. 274.

[2]Paragraph 17 of Jersey City's original complaint, R. 7.

[3]*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-3.

[4]*American Toll Bridge Co.* v. *Railroad Commission*, 307 U. S. 486, 494.

B. The Commission further properly exercised its administrative discretion in declining to grant the Price Administrator's motion of October 14, 1943 for further hearing to permit the introduction of evidence tendered in that motion to show that appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line.

On October 14, 1943, the Price Administrator filed a motion[1] with the Commission requesting that the Commission modify its order of September 18, 1943 and grant a further hearing for the purpose of receiving certain evidence which, the Price Administrator claimed, would show that because of appellant's increased 1943 traffic appellant was entitled to no increase whatever in its present 8 cent fare on its downtown line. Such motion was in fact barred by the Commission's Rules of Practice,[2] since it constituted a petition for reconsideration and modification of the Commission's order of June 8, 1943, authorizing an increase in appellant's present 8 cent fare on its downtown line to 9 cents, and since the time specified in the Commission's Rules for filing such a petition had expired thirty days after the date of such order. Nevertheless, the Commission, waiving its Rules, considered the motion and the evidence tendered thereby. The Commission, in rejecting this motion, stated in its report and order of November 2, 1943:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were

[1] R. 67-70.
[2] See Appendix 1 hereto.

> held, we would feel warranted in modifying our findings as made in the second report * * * the motion will therefore be overruled."[1]

Curiously enough, it is on this very statement by the Commission that the majority below in particular based their finding that appellees were denied a full and fair hearing.

Having quoted this statement in their opinion, the opinion of the majority below proceeds to state:

> "Obviously, from the above language, the Commission was not concerned with the technical niceties of the effort to present the desired testimony. *It actually considered the proposed evidence and decided that, despite it, its decisions should stand.* The municipal plaintiff and the intervenor, by that evidence, offered to show that the carrier's rise in business and net earnings had completely removed any reason for an increase over the eight cent fare. *In refusing to consider such testimony* which, under the terms of its tender went to the heart of the controversy, in our judgment the Commission did act arbitrarily and contrary to the mandate of its statute." (Italics supplied.)[2]

There would seem to be an obvious self-contradiction between the second sentence above quoted, in stating, with relation to the appellees' tendered evidence

> "It (the Commission) actually considered the proposed evidence and decided that, despite it, its decisions should stand"

and the statement in the fourth sentence

> "In refusing to consider such testimony", etc.

---

[1]R. 275.
[2]R. 197.

To do the majority justice, it is probable that the fourth sentence is elliptical and was intended to mean

> "In refusing further hearing to consider such testimony".

However, in Jersey City's amended complaint, this same statement of the Commission is quoted and the complaint expressly alleges:

> "To the extent that the Commission prejudges and prophesies its findings that would result from a hearing not yet held the Commission acts arbitrarily, capriciously and beyond the scope of proper judicial proceeding, and is guilty of an abuse of discretion."[1]

While the majority below do not expressly say so, it must have been on some such theory that the majority held that the Commission's statement shows that the Commission acted "arbitrarily and contrary to the mandate of its statute".

Any such theory is patently absurd. Appellees certainly do not mean to question that the Price Administrator's motion for further hearing placed before the Commission both the tendered evidence and the purpose for which it was tendered. Otherwise, neither under the Commission's Rules of Practice nor on any other basis of orderly procedure would the Commission have been required to give any consideration whatever to the granting of a further hearing to receive such evidence. The tendered evidence and the purpose of its tender being before the Commission and the Commission having, as stated by the

---

[1] R. 35.

majority below, "actually considered it", the Commission like any other tribunal had the right and duty to determine whether it would be justified in granting further hearing to permit the introduction of such evidence.[1] The Commission having considered the tendered evidence and having, again as stated by the majority below, "decided that, despite it, its decisions should stand" could have had no possible reason for granting further hearing for the introduction of such evidence. To this extent, it certainly was the duty of the Commission to "prejudge and prophesy its findings that would result from a hearing not yet held". Such prejudgment and prophesy, far from being "arbitrary, capricious and beyond the scope of proper judicial proceedings and an abuse of discretion" as charged by Jersey City, was a necessary and reasonable exercise of the Commission's administrative powers and duties.[2] Moreover, appellant submits that it was beyond the power of the District Court to substitute its judgment for that of the Commission with respect to the justification for further hearing. The Com-

[1] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

[2] *Baltimore and Ohio R. Co.* v. *United States*, 298 U. S. 349, 389; *Acker* v. *United States*, 298 U. S. 426, 433; *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 481; *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494. Note that *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248, cited by the Court below, is distinguished as unique and contrary to the general rule in *Baltimore and Ohio R. Co.* v. *United States*, *supra*, and in *United States* v. *Northern Pacific Ry. Co.*, *supra*. See also *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 307, 310, 311, 319; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 397, 398; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164.

mission had the right and duty to determine whether the tendered evidence was relevant and competent and whether, if received, it would have required the Commission to disregard all other evidence which would have supported its findings.[1] Appellant submits that under all the authorities cited the Commission's determination in this respect was conclusive.

II

APPELLEES' TENDERED EVIDENCE WAS IRRELEVANT AND INCOMPETENT FOR THE EXPRESS AND SOLE PURPOSE FOR WHICH IT WAS TENDERED.

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return.

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized.

Upon the hearing before the Commission of September 28 and 29, 1943, appellees, for the express and sole purpose

[1] *Pittsburgh Plate Glass Company* v. *N. L. R. B.*, 313 U. S. 146, 163.

of showing that appellant was entitled to no increase whatever over its present 8 cent fare on its downtown line authorized by the Commission's order of July 11, 1938, either to the 9 cent fare authorized by the Commission's order of June 8, 1943, or to the alternative fares of 11 tokens for $1 or a cash fare of a dime authorized by the Commission's order of August 3, 1943, attempted to present certain evidence and indulge in certain cross-examination.[1]

Appellees claimed that such tendered evidence would show that appellant was entitled to no increase in its present 8 cent fare on its downtown line because, due to appellant's increased 1943 traffic, appellant's net revenues would so increase that without any increase in such 8 cent fare (1) appellant would earn its current bond interest, (2) appellant would earn "more than" the revenue which the Commission had, in its report of July 11, 1938, estimated appellant would earn under the 8 cent fare authorized by its order of that date, and (3) appellant would earn "more than" the revenue which the Commission had, in its report of June 8, 1943, estimated appellant would earn under the 9 cent fare authorized by its order of that date. Appellees claimed that it was the Commission's intention to limit appellant to such estimated revenues.[2]

The only specific evidence in this respect offered by appellees was a condensed income statement of the Hudson & Manhattan Railroad Company for the seven months ending July 31, 1943, in comparison with the same months of 1942.[3] Except for the fact that this exhibit covered two additional months of 1943, it was identical with an exhibit

---

[1]Tr. 2144-51, 2215-29, 2446-50.
[2]Tr. 2149-50, 2449-50.
[3]Tr. 2446-50, R. 66.

attached to the Price Administrator's unsworn reply[1] to appellant's sworn petition of July 8, 1943, for reopening and modification of the Commission's order of June 8, 1943. In the Commission's report of August 3, 1943, based on such sworn petition of appellant and the unsworn replies of the Price Administrator and Jersey City, the Commission rejected the exhibit then offered, which covered the first five months of 1943 in comparison with the same months of 1942. The ground for rejection was that the exhibit was not a condensed statement of appellant's income from its railroad operations, but included, without any segregation, appellant's income from its office building operations, and therefore was of no probative value as to appellant's income from its railroad operations.[2]

Appellees endeavored to cross-examine appellant's witnesses with respect to appellant's income and expenses attributable to railroad operations for the first seven months of 1943.[3] The principal matter to which such cross-examination was directed was the reasonableness of the war contingency reserve of $240,000 a year, which appellant had set up by a $20,000 monthly charge to operating expenses for self-insurance against extraordinary war hazards. The reasons which had led appellant to set up this reserve had been the subject of testimony[4] at the hearings before the Commission in 1942, and the Commission had found in its report of June 8, 1943, that[5]

---

[1]R. 364.
[2]R. 324-325.
[3]Tr. 2144-51, 2215-29.
[4]Tr. 1264-5.
[5]R. 267.

> "Respondent's annual operating costs have increased since 1937 by about $671,500 and since 1941 by about $466,500, including the war contingency reserve of $240,000 a year for protection against extraordinary war hazards, *which we may accept as reasonable,* even though none of it had been used at the time of the further hearing, or more than 9 months after the entrance of this country into the war, and only $20,000 thereof (used to defray the portion not covered by insurance of the expenses occasioned by the derailment at Exchange Place in April, 1942, previously referred to) had been used at the time of the oral argument in April, 1943. (Italics supplied.)[1]

At the hearing on September 28, 1943, counsel for the Price Administrator attempted to cross-examine appellant's witnesses as to the justification for this war contingency reserve, in comparison with what he alleged to be the lower cost of War Damage Corporation insurance.[2] At the hearing on September 29, 1943, counsel for the Price Administrator produced a witness who testified that appellant might

---

[1]The Commission's observation as to the extent to which this reserve had been used up to the time of the oral argument is erroneous. Counsel for appellant had expressly stated at the oral argument (Tr. 1942-44) that $20,000 *a month* had been used in reducing the incursion on appellant's insurance reserve in connection with the derailment which had occurred at appellant's Exchange Place Station on April 26, 1942, in which several passengers were killed and many were injured. The Commission's error was further corrected by the testimony of appellant's comptroller, Mr. Fritsch, on September 28, 1943, when he testified (Tr. 2216-18) that at the time of the oral argument an aggregate of $180,000 had been credited to this reserve and that $125,000 thereof had been expended in connection with the Exchange Place derailment.

[2]Tr. 2144-50.

obtain insurance from War Damage Corporation at the rate of 18¢ per $100 of coverage against damage resulting from enemy attacks or from efforts of the United States forces in repelling enemy attacks.[1] Since such war damage insurance would not, as the witness admitted,[2] have protected appellant against the war hazards to which it was subject by reason of the speed-up in war traffic and the drafting of experienced employees, this evidence was of no probative value as to the reasonableness of appellant's reserve.

The Examiner refused to receive the condensed income statement of the appellant for the seven months ended July 31, 1943, and refused to permit cross-examination of the appellant's witnesses with respect to appellant's net income from railroad operations for the seven months ended July 31, 1943, on the ground that such evidence was not within the scope of the Commission's order of reopening of September 18, 1943.[3] That order limited the evidence which might be received on further hearing to evidence relating solely "to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943",[4] *i.e.*, the modifications by its order of August 3, 1943, permitting alternative fares of 11 tokens for $1, or a cash fare of a dime, in lieu of the 9 cent fare authorized by the Commission's order of June 8, 1943. The Examiner, however, advised the appellees that they might petition the Commission

[1]Tr. 2450-52.
[2]Tr. 2451-52.
[3]Tr. 2034-6, 2144-51, 2215-29, 2446-50.
[4]R. 351.

in accordance with the Commission's Rules of Practice for a broadening of the Commission's order of September 18, 1943, so as to permit the receipt of the tendered evidence and cross-examination.

As already stated, the Price Administrator did file such a petition in the form of his motion of October 14, 1943, but Jersey City never filed any such petition, though it did, after appellant's reply of October 25, 1943, to the Price Administrator's motion, attempt by its letter to the Commission dated October 25, 1943, to adopt the Price Administrator's motion. This letter the Commission ignored as not being in compliance with its Rules of Practice.

Waiving, for the moment, the Price Administrator's lack of right under his intervention to tender such evidence at all, the failure of Jersey City to make any such tender in conformance with the Commission's Rules of Practice, and the estoppel of both Jersey City and the Price Administrator to tender such evidence at all, appellant desires here to show that the tendered evidence was wholly incompetent and irrelevant for the sole purpose for which it was tendered.

A. The Commission could not legally have limited appellant to such fares as would yield merely appellant's current bond interest. Appellant is legally entitled to charge such just and reasonable fares as would enable appellant to earn, as nearly as may be, in view of the competition of other forms of transportation, a fair return on the value of its railroad properties. The District Court did not find, nor did appellees contend, that appellant's present 8 cent fare would yield, or the enjoined fares exceed, such fair return.

Counsel for appellant confess they do not even understand the grounds of Jersey City's contention that the Com-

mission would have been required to limit appellant to its present 8 cent fare prescribed by the Commission's order of July 11, 1938, had Jersey City been permitted to show by its tendered evidence that because of appellant's increased 1943 traffic appellant under that fare might earn net revenues sufficient to pay its current bond interest.[1] Neither do counsel understand on precisely what basis the majority below assumed the validity of this contention as a ground for their holding that the Commission's refusal to receive the evidence tendered by Jersey City in this respect was a denial of a full and fair hearing.

Apparently the theory adduced by Jersey City and adopted by the District Court was that the proceedings before the Commission were under Section 15a of the Act (the so-called "revenue section") and that therefore the Commission was limited to according appellant only such revenues as would meet its minimum needs, which Jersey City assumed to be revenues sufficient merely to meet appellant's current bond interest. Neither the Court nor Jersey City, however, cited any authority for such a construction of Section 15a. Moreover, it is to be noted that the Commission's orders of June 8, 1943 and November 2, 1943 were expressly amendments to its order of July 11, 1938, which order was specifically based on Section 1 *and* Section 15a of the Act.[2]

Indeed, counsel feel that the time of this Court would be wasted by any further analysis of the grounds of Jersey City's contention, or of the assumption of its validity by the

---

[1]The Price Administrator's tender of evidence was not made with any specific relation to the amount of interest which appellant might earn on its bonds (Tr. 2449-50). The only specific tender in this respect was that of Jersey City (Tr. 2149-50).

[2]R. 311.

majority below, since whatever its basis that contention is clearly erroneous in law.

It is beyond question that appellant is entitled to charge such just and reasonable fares as would yield appellant a fair return on its investment if, under just and reasonable fares, it can earn such a return. The only limitation upon the appellant's right in this respect is that recognized by this Court in *Public Service Commission of Montana* v. *Great Northern Utilities Company*, 289 U. S. 130. There this Court held that despite this unquestioned right, a regulatory body is not required to assure a public utility of such fair return where, because of competitive conditions, it is impossible to earn such fair return under just and reasonable rates. This, however, is far from holding that a regulatory body must deny a public utility the right to charge such just and reasonable rates as, in view of competitive conditions, will, as nearly as possible, yield a fair return.

Here, the Interstate Commerce Commission has specifically found that both the 9 cent fare authorized by its order of June 8, 1943, and the alternative fares of 11 tokens for $1 or a cash fare of a dime, are just and reasonable fares. It has, moreover, specifically found that upon the evidence of record such fares will not yield substantially more, but probably less, than appellant's current bond interest.

In the Commission's report of June 8, 1943, the Commission found that under the 9 cent fare on appellant's downtown line there authorized, appellant would earn

> "a probable annual net income available for interest on the bonds allocable to the railroad properties of $2,181,460. Deducting the annual interest of

> $1,363,906 on the first two bond issues would thus leave about $817,554 for payment on the adjustment income bonds, equivalent to interest thereon at the rate of 3.473 per cent."[1]

Moreover, it is to be noted that this estimate by the Commission of appellant's probable annual net income under a 9 cent fare was based on an exhibit received by the Commission upon the oral argument preceding its order of June 8, 1943 upon the stipulation of all parties,[2] but at the request of appellees. This exhibit showed appellant's increase in traffic for January and February of 1943.[3] The Commission equated these increases to a 12 months' basis and, on a formula as to increase in operating expenses incident to such increased traffic agreed to by all parties,[4] made its estimate of appellant's probable revenues under the 9 cent fare there authorized.

In the Commission's report of November 2, 1943, the Commission expressly found that under the alternative fares there authorized of 11 tokens for $1 or a cash fare of a dime applicable both to appellant's uptown and downtown lines, appellant would earn no more and probably less net revenue than under the 9 cent fare on appellant's downtown line authorized by the Commission's order of June 8, 1943, combined with appellant's present and authorized 10 cent fare on its uptown line. The Commission said in this connection:

> "Based upon the number of local interstate passengers carried by respondent in the first 8 months of 1943, adjusted to a 12-month basis, and assuming

---

[1] R. 268.
[2] R. 257, 275.
[3] R. 410-411.
[4] Tr. 1888-9.

a 5 per cent loss in the downtown local passengers by reason of an increase in the fare, the proposed alternative basis can be expected to bring to respondent at least no greater gross or net revenue than would result under cash fares of 10 cents uptown and 9 cents downtown, if both of such fares were collectible, as contemplated by our findings in the second report. If such estimate were based upon a use ratio of 90 per cent tokens and 10 per cent dimes, as respondent claims it should be, the result would approximate $85,000 less annual revenue under the alternative basis than under the 10-cent and 9-cent cash fares."[1]

It is further to be noted that this estimate by the Commission of appellant's probable net income under the alternative fares authorized by its order of November 2, 1943 was expressly based upon the exhibits already referred to introduced by appellant on the hearing of September 28, 1943, showing appellant's actual local interstate passenger traffic and revenues for the eight months ended August 31, 1943, and its local interstate passenger traffic and revenues for the eight months ended August 31, 1943, equated to a twelve months' basis.[2]

On the hearing before the District Court, counsel for Jersey City insisted that the Commission could make no valid estimate on the basis of such exhibits, because they did not include appellant's increased 1943 joint service traffic with the Pennsylvania Railroad. However, the Commission had before it at the time it made its order of June 8, 1943, the increase in appellant's total traffic, including its joint service traffic, up to and including February, 1943. In the Commission's report of June 8, 1943, the Commis-

[1]R. 279.
[2]Tr. Exs. F-148, F-149, and F-150.

sion had made an estimate as to the increase in appellant's traffic and revenues reasonably to be expected for the entire year 1943 based on an equation for the twelve months of 1943 of the increase in all traffic for the first two months of that year, including the increase in joint service traffic.[1] Even had the Commission had before it the actual increase in joint service traffic, as well as of other traffic, for the eight months of 1943, it would still have had to use an equated figure to reach an estimate as to appellant's anticipated increase in all traffic and revenues for that year. Consequently, it must be assumed that the Commission gave full weight to the probable revenue result to the appellant of any increase in its 1943 joint service traffic in reaching its conclusion that under its order of November 2, 1943, appellant would earn no more, and probably less, than under its order of June 8, 1943.

Moreover, it is again to be emphasized that neither before the District Court nor before the Commission did Jersey City claim that any or all such tendered evidence would have shown more than that appellant, under its present 8 cent fare, would earn its current bond interest; furthermore, at no time, either before the Commission or before the District Court, did either of the appellees claim that the tendered evidence would have shown that, under its present 8 cent fare, appellant would have earned a fair return on its railroad property, or under the enjoined fares would have earned in excess of such fair return.

Assuming therefore that appellees' tendered evidence and cross-examination would have established all appellees claim for it, *i.e.*, that under its present 8 cent fare appellant would earn its full current bond interest, this would still

---

[1]R. 268-269.

leave appellant far short of earning a fair return on its railroad properties. Appellant's full current bond interest as of August 31, 1942 on its $50,899,418 of bonded indebtedness allocable to railroad properties as of that date was $2,591,053.30.[1] The undisputed cost of its railroad properties as of August 31, 1942 was $66,541,352.08.[2] Should appellant earn its full current bond interest, this would represent a return of 3.82% on the admitted cost of its railroad properties, which cost the record shows to be far below the reproduction cost new less depreciation.[3]

B. The Commission could not legally have limited, nor did it intend to limit, appellant merely to the revenues which the Commission, in its reports of July 11, 1938 and June 8, 1943, estimated appellant would earn under the 8 cent and 9 cent fares there respectively authorized.

The Price Administrator's tender of evidence to show that the Commission was warranted in permitting no increase whatever in appellant's 8 cent fare was limited to an offer to prove that, as a result of the war, the earnings of the appellant at an 8 cent fare for the full year of 1943 would exceed "the amount which the Commission found to be adequate and reasonable" in its order of July 11, 1938, and in its order of June 8, 1943.[4] Jersey City made no spe-

---

[1]Tr. Ex. 26-R Supp.

[2]R. 252, Tr. Ex. 26-R Supp.

[3]R. 252.

[4]The offer of proof on behalf of the Price Administrator was as follows:

"Mr. Booth: I am not going to read any figures; I am merely going to state what the Commission stated, that the——

May I state this, then? That in its 1938 order in this case the Commission estimated that the earnings of the com-

cific offer of evidence in this respect.[1] However, it is fair to say that Jersey City's offer to prove that due to 1943 increased traffic appellant would earn its full current bond interest would necessarily include proof that appellant would earn more than the Commission estimated in either of its orders, since in both orders the Commission estimated appellant would earn *less* than its current bond interest.

Later appellant will show that the Price Administrator had no standing to offer any evidence whatever in this respect. It desires here, however, to discuss the evidence

---

pany would be a certain figure under the eight-cent fare; in its June 8th order the Commission estimated the earnings of the company would be a certain amount under the nine-cent fare; if we were given an opportunity to demonstrate by the presentation of evidence in this hearing we would show that the current earnings of the company at the eight-cent fare and for the full year 1943 will exceed either of the amounts which the Commission found to be adequate and reasonable in these two previous orders and that if an adjustment were made for items of expenses which we believe to be without foundation or reason that the earnings would still be substantially higher, and that is proof that we would present if we were given an opportunity to do so." (Tr. 2449-50)

[1]The offer of proof on behalf of Jersey City was as follows:

"Mr. Eisen: Inasmuch as you have made the ruling, Mr. Examiner, I make an offer of proof to the effect that I have a witness here that was ready, able and willing and would have testified in due time, that the situation of the Hudson & Manhattan Railroad for the first six months of this year as such, that it reflects an increase of 30 per cent. in patronage over 1941, the corresponding period of 1941, that the H. & M. Railroad has testified that under existing fares of 9 and 10 cents a 30 per cent. increase in patronage would be required to enable them to meet interest on their bonded indebtedness, and that therefore as reflected by the first six months of this year, there was no need, in so far as revenue is concerned, for any prescription of any rate in excess of 8 cents." (Tr. 2149-50)

tendered, whether it be considered that of the Price Administrator or that of Jersey City, to show that the Commission could not legally have limited appellant to the revenues the Commission estimated appellant would earn either under its order of July 11, 1938, or its order of June 8, 1943, and therefore the offer of such evidence was irrelevant to establish that the Commission could not legally authorize any increase in appellant's present 8 cent fare.

The Commission, in its report of July 11, 1938, estimated that, under the 8 cent fare on appellant's downtown line to which its order of the same date limited appellant, appellant's

> "* * * net income available for bond interest * * * would be about $2,260,817"[1]

The Commission found that this would represent a rate of return of 3.4% on the basis of original cost and 3.31% on the basis of depreciated reproduction cost new.[2] In the Commission's report of June 8, 1943, the Commission stated that such estimated revenues under its order of July 11, 1938 were

> "approximately $541,000 less than the amount which we found would be necessary to meet increased operating expenses, increased taxes, and current interest on the railroad portion of the outstanding bonds."[3]

Moreover, in such later report, the Commission found that appellant, instead of earning under such 8 cent fare only $541,000 less than its current bond interest, had earned in

---

[1] R. 311.
[2] R. 311.
[3] R. 256.

1938, $1,113,350, in 1939, $806,048, in 1940, $817,424, and in 1941, $892,148, less than its current bond interest and further, that as a consequence, appellant's cumulative and unpaid interest on its Adjustment Income Bonds as of December 31, 1941 had risen to $5,494,727 (instead of $2,118,746 as of December 31, 1937).[1] It is particularly to be noted that the interest on appellant's Adjustment Income Bonds is a fixed charge which, to the extent the same is unpaid, becomes enforceable by foreclosure at the maturity of said Bonds in 1957.[2]

It is, of course, ridiculous to suggest that the Commission, by its report of July 11, 1938, prescribing an 8 cent fare on appellant's downtown line, intended to limit appellant to earning $541,000 less than its current bond interest, not to speak of the far greater amounts by which in succeeding years appellant failed to earn such interest. The Commission's report plainly shows that its estimate was made for the purpose of justifying its denial of appellant's proposed 10 cent fare on its downtown line, based on the Commission's conclusion in its report that, because of diversion which would be incident to any increase in its fare, due to the competition of other forms of transportation, appellant would earn more under the prescribed 8 cent fare than under its proposed 10 cent fare.[3] The Commission, therefore, proceeded to estimate what appellant might earn under the 8 cent fare then prescribed as a basis for its conclusion that such fare would yield appellant more revenue than a 10 cent fare.

---

[1]R. 251.

[2]Tr. Ex. 23.

[3]R. 310-311.

Again, it is virtually impossible to understand the basis of appellees' contention either that the Commission intended to, or had the power to, limit appellant to the revenues which the Commission estimated such 8 cent fare would yield. It seems to be based upon some bizarre interpretation placed by appellees on the prior refusal of the District Court to grant appellant an injunction against the Commission's order of July 11, 1938 restricting appellant to an 8-cent fare on its downtown line, and the affirmance by this Court of the District Court's refusal in this respect. Again, it is not worth while to attempt to follow appellees' "reasoning". It will suffice to say that all the District Court did was to hold there was evidence before the Commission to support the Commission's order restricting appellant to an 8 cent fare on its downtown line, and that this Court affirmed the District Court on the same ground. It is perfectly clear that, had the Commission determined by its report and order of July 11, 1938 to authorize appellant's proposed 10 cent fare, the District Court and this Court, had appellees sought to enjoin such an order, would have sustained it for the same reason that the Commission's actual order was sustained, *i.e.* that there was evidence before the Commission to support its order. It can hardly be claimed that there was no such evidence, in view of the fact that three Commissioners dissented from the order of July 11, 1938, and have persisted in dissenting from the Commission's later orders insofar as they deny appellant a 10 cent fare on its downtown line, on the very ground that there was ample evidence before the Commission to sustain such a fare.

What appellees basically do not understand is the real scope of this Court's decision in affirming the District

Court's denial to appellant of an injunction against the Commission's order of July 11, 1938, limiting appellant to an 8 cent fare on its downtown line. That decision merely served to make abundantly clear that this Court meant exactly what it said in its prior decisions there cited, that is, that if there is any evidence whatever before the Commission to sustain its findings and order, the courts were without power to set aside such findings and order, even though there was other equally competent evidence before the Commission against them, and even though the Court might disagree with the Commission as to the conclusion to be drawn from all the evidence.

What has just been said with relation to the Commission's estimate of revenues under its order of July 11, 1938, applies equally to the estimate of revenues which the Commission made in its report of June 8, 1943, with reference to the 9 cent fare there prescribed. There the Commission estimated that under such 9 cent fare appellant would earn approximately $2,404,502, or at the rate of 4.42% on its 5% Adjustment Income Bonds.[1] This would be $186,552 less than the full interest on such Bonds.

---

[1]R. 269.

III

JERSEY CITY WAS ESTOPPED BOTH FROM ASKING THE COMMISSION TO RECEIVE THE TENDERED EVIDENCE AND FROM SEEKING AND OBTAINING AN INJUNCTION FROM THE DISTRICT COURT BASED ON THE COMMISSION'S REFUSAL TO RECEIVE SUCH EVIDENCE.

INTERWOVEN WITH, AND IN REALITY A PART OF SUCH ESTOPPEL, WAS JERSEY CITY'S TOTAL FAILURE TO EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE COMMISSION.

The estoppel against Jersey City from asking the Commission to receive the tendered evidence, designed to show that appellant was entitled to no increase whatever over its present 8 cent fare prescribed by the Commission's order of July 11, 1938, and from seeking and obtaining an injunction against the Commission's orders, based on the Commission's refusal to receive such evidence, arises primarily from the nature of Jersey City's *original* complaint before the District Court, preceding the amended complaint upon which that Court enjoined the Commission's orders of June 8, 1943 and November 2, 1943. Interwoven with and forming part of such estoppel, however, is the total failure of Jersey City to avail itself of any of its administrative remedies before the Commission with respect to the Commission's enjoined orders authorizing the respective increases over such present 8 cent fare.

The full nature of this estoppel can best be understood by a chronological consideration of Jersey City's conduct, and incidentally that of the Price Administrator, before the

Commission and the District Court, relating both to appellant's present 8 cent fare and to the Commission's authorized increases in that fare, first to 9 cents and then to the alternative fares of 11 tokens for $1 or a cash fare of a dime.

The chronology of Jersey City's conduct and that of the Price Administrator in this respect has been fully set out in the STATEMENT OF THE CASE, and therefore will not be repeated here. Appellant submits that the details of such conduct as there shown at pages 10 to 21 demonstrate that Jersey City was clearly estopped from asking the Commission, on the further hearing of September 28 and 29, 1943, to receive the evidence tendered by appellees or to permit their attempted cross-examination, both intended to show that because of appellant's increased 1943 traffic and revenues the Commission was not warranted in granting appellant any increase whatever over its existing 8 cent fare, either to the 9 cents authorized by the Commission's order of June 8, 1943 or the alternative fares authorized by the Commission's order of August 3, 1943.

Appellant submits that Jersey City was clearly estopped from asking the Commission to receive such evidence and to permit such cross-examination (1) by reason of the specific allegations and prayer of its *original* complaint by which the Commission had been induced to make its order of reopening and further hearing to meet the allegations and prayer of such complaint; (2) by reason of Jersey City's failure within the time and manner specified by the Commission's Rules of Practice to ask reopening or reconsideration of the Commission's order of June 8, 1943, authorizing the 9 cent fares; and (3) by reason of the fact that Jersey City, in its reply of July 14, 1943, to appellant's

petition of July 8, 1943, for modification of the Commission's order of June 8, 1943, had asked the Commission for further hearing only as to appellant's disability to collect a 9 cent cash fare and not as to the validity of the 9 cent fare, itself.

Appellant submits, moreover, that this estoppel might well be extended to the Price Administrator by reason of his acceptance of the opportunity offered him by the Commission to participate in the further hearing thus induced by Jersey City.

Appellant will now proceed to show that both on the foregoing grounds and by reason of Jersey City's subsequent conduct before the Commission, Jersey City was furthermore estopped from filing its amended bill of complaint on which the District Court granted the injunction here appealed from. The facts as to Jersey City's conduct before the Commission subsequent to the hearing of September 28 and 29, 1943, and prior to the filing of its amended complaint herein asking an injunction against the Commission's orders of June 8, 1943 and November 2, 1943, are fully set out at pages 21 to 27 of the STATEMENT OF THE CASE, and there therefore would seem to be no occasion to repeat them here.

As already stated, the only substantial ground which Jersey City alleged in its amended complaint for such an injunction was that the Commission had denied Jersey City a full and fair hearing, particularly by refusing further to reopen the proceedings to receive the tendered evidence and cross-examination rejected on the hearing of September 28 and 29, 1943.

Appellant, in submitting that Jersey City was estopped from filing its amended complaint in the District Court

asking an injunction against the Commission's order on such a ground, and that such complaint was in any event premature, is appealing for no harsh or technical application either of the doctrine of estoppel or of the rule that administrative remedies must be exhausted before resort is had to the courts.

Indeed, appellant invokes against Jersey City the rule requiring the exhaustion of administrative remedies only because Jersey City's conduct in this respect was such as in itself to create an estoppel, irrespective of the major element of estoppel supplied by the nature of the allegations and prayer of Jersey City's original complaint. In other words, Jersey City not only failed within the time and manner specified in the Commission's Rules of Practice to petition for any reopening of the Commission's order of June 8, 1943 authorizing the 9 cent fare, but in its reply to appellant's petition for reconsideration and modification of that order so as to permit alternative fares, Jersey City's suggestion of further hearing was expressly limited to the justification for such alternative fares instead of such 9 cent fare, and there was no suggestion whatever of further hearing as to the justification for the 9 cent fare itself.

While, therefore, appellant recognizes that the rule requiring exhaustion of administrative remedies before appeal is made for judicial relief is not inflexible, the facts here afford no justification for departing from that rule as stated by this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, as

> "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

Furthermore, this Court's attention is respectfully called to what was said by the District Court itself in this respect, in *Board of Public Utility Commissioners of N. J.* v. *U. S.*, 21 F. Supp. 543, where that Court said, p. 549:

> "All parties to the proceeding are entitled to file their exceptions to the proposed report, and as a matter of practice the Commission accepts as sound and accurate, and as supported by the evidence, all findings of fact in the proposed report to which no exceptions are made. In the instant case plaintiff filed exceptions but made no objection as to the sufficiency of the findings. Under the Commission's Rules of Practice (Rule XV) it is permissible for any party, after decision, to apply for a rehearing for the taking of additional testimony, for reargument, or for reconsideration. Plaintiff did not apply to the Commission for rehearing in this case. By petition for such rehearing the way was open to plaintiff to urge upon the Commission the argument which it now presents for the first time to the court as to alleged insufficiency of the findings. It should have exhausted its remedies before the Commission before appealing in this respect to the court."

Entirely aside, however, from any question of Jersey City's failure to exhaust its administrative remedies, there is a clear case of equitable estoppel against Jersey City's right to raise, either before the Commission or the District Court, the question whether the Commission was justified in granting any increase whatever over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938. Jersey City before filing its amended complaint before the District Court, had at least three appropriate

opportunities to raise that question, two before the Commission and one before the District Court itself, and not only failed to do so, but instead raised entirely different questions.

Jersey City's first opportunity to raise that question was when the Commission for the first time authorized an increase in appellant's 8 cent fare by its report and order of June 8, 1943, according appellant a 9 cent fare. As has been seen, Jersey City not only failed to file any petition for reconsideration or modification of that order, but in its reply to appellant's petition for reconsideration and modification, suggested further hearing only as to the justification for permitting any increase in the 9 cent fare to the alternative fares asked by appellant, and suggested no hearing whatever as to the justification for the 9 cent fare itself.

The second appropriate opportunity for Jersey City to have raised such question before the Commission was upon the issuance of the Commission's order of August 3, 1943, authorizing the alternative fares. Jersey City then had the right, as soon as appellant published such fares, to apply to the Commission for suspension of them, and to raise the question whether any increase whatever over appellant's existing 8 cent fare was justified.

The third appropriate opportunity for Jersey City to have raised that question was when, on September 13, 1943, Jersey City filed its *original* complaint in the District Court asking an injunction against the Commission's order of August 3, 1943. Surely if Jersey City were ever to raise the question whether the Commission was justified in permitting any increase whatever over appellant's present 8 cent fare prescribed by the Commission's order of July 11, 1938, it was when Jersey City filed its original complaint.

The Commission's order of June 8, 1943, authorizing an increase in such 8 cent fare to a 9 cent fare, was then in effect and had then been in effect for some three months. The only reason the 9 cent fare itself was not in effect, was the physical impossibility of the collection of a 9 cent *cash* fare with appellant's fare collection boxes. Moreover, on September 13, when the original complaint was filed, there was available to Jersey City substantially the same evidence with reference to appellant's 1943 increased traffic and revenues as the Price Administrator tendered a few days later at the further hearing on September 28, 1943, under the Commission's order of reopening of September 18, 1943. Furthermore, it has been seen that such order of reopening was made by the Commission for the very purpose of satisfying the allegations of Jersey City's original complaint that Jersey City had been denied a full and fair hearing. The only denial, however, of full and fair hearing alleged in the original complaint was as to the justification for the Commission's order of August 3, 1943 in permitting an increase to the alternative fares from the 9 cent fare authorized by the Commission's order of June 8, 1943 because of the physical limitations of appellant's fare collection boxes. There was no allegation in the original complaint of any denial of a full and fair hearing to Jersey City in connection with the 9 cent fare itself, or any allegation that the Commission was not warranted in authorizing the increase over appellant's existing 8 cent fare to the 9 cent fare already authorized. On the contrary, Jersey City's original complaint implicitly and explicitly asked that the appellant Commission and the appellant Railroad Company be restrained from departing from such 9 cent fare.

Moreover, when the Commission by its order of September 18, 1943, reopened the proceedings and granted further hearing expressly for the purpose of permitting Jersey City to present evidence and to cross-examine as to the justification for the Commission's order of August 3, 1943 in permitting an increase to the alternative fares from the 9 cent fare authorized by the Commission's order of June 8, 1943 because of the physical limitations of appellant's fare collection boxes, Jersey City presented not one word of evidence in this respect. Instead, Jersey City for the first time raised the question, and for the first time tendered evidence purporting to show, that neither in the Commission's order of August 3, 1943, nor in its order of June 8, 1943, was the Commission justified in permitting any increase whatever over appellant's existing 8 cent fare authorized by the Commission's order of June 11, 1938.

Accordingly, appellant respectfully submits that not only was appellees' evidence, tendered for the sole purpose of showing that the Commission was unwarranted in authorizing any increase whatever in appellant's existing 8 cent fare, incompetent and irrelevant for that purpose, as shown under Point II of this argument, but that even had it been competent and relevant, Jersey City was estopped both from asking the Commission to receive that evidence and from seeking and obtaining an injunction against the Commission's orders because of the Commission's refusal to receive such evidence.

It has been noted that although appellant raised this question of estoppel before the District Court at the final hearing on the amended complaint, the only reference which

the majority of that Court made to that question was to say:

> "We do not see that the contentions raised by defendants that plaintiffs are estopped from questioning the validity of the orders of June 8, 1943 and November 2, 1943; and that the action is prematurely brought, are answers to the above" (*i.e.*, denial of full hearing).[1]

Apparently the majority wholly confused the question of estoppel with the question of failure to exhaust administrative remedies. (See the Court's finding of fact No. 30.)[2] In any event, the majority made no reference whatever to the facts which have been here set out.

Appellant respectfully submits that in this respect the majority of the Court below erred, and that on this ground alone this Court would be warranted in reversing their order granting Jersey City an injunction under its amended complaint.

Appellant believes it unnecessary further to protract discussion of the question of estoppel to consider whether such estoppels against Jersey City extend to the Price Administrator, since, as appellant will now show, the Price Administrator, on this record, had no standing in any event to ask the Commission to receive the tendered evidence.

---

[1]R. 198.
[2]R. 216.

IV

THE PRICE ADMINISTRATOR, HAVING NOT ONLY FAILED TO OFFER ANY EVIDENCE WHATEVER BEFORE THE COMMISSION THAT THE INCREASED FARES AUTHORIZED BY THE ENJOINED ORDERS WOULD RESULT IN INFLATION, BUT HAVING EXPRESSLY CONCEDED TO THE CONTRARY, THE COMMISSION'S REFUSAL TO RECEIVE THE EVIDENCE TENDERED BY THE PRICE ADMINISTRATOR, TO SHOW THAT BECAUSE OF APPELLANT'S INCREASED 1943 REVENUES THE COMMISSION WAS NOT WARRANTED IN PERMITTING ANY INCREASE WHATEVER OVER APPELLANT'S PRESENT 8 CENT FARE, COULD NOT CONSTITUTE A DENIAL OF FULL AND FAIR HEARING TO THE PRICE ADMINISTRATOR, OR WARRANT THE DISTRICT COURT ON THAT GROUND IN ENJOINING THE COMMISSION'S ORDERS.

THE DISTRICT COURT WAS LIKEWISE UNWARRANTED IN ENJOINING THE COMMISSION'S ORDERS ON THE GROUND THAT THE COMMISSION HAD "LIGHTLY BRUSHED ASIDE" THE CONTENTION OF THE PRICE ADMINISTRATOR THAT THE INCREASED FARES THEREBY AUTHORIZED VIOLATED THE NATIONAL EMERGENCY POLICY OF ECONOMIC STABILIZATION.

Had the Price Administrator tendered any competent evidence to the Commission that the increased fares authorized by the enjoined orders of June 8, 1943 and November 2, 1943 would result in inflation or in increased cost of living, and had the Commission refused to receive such evidence, appellant does not question that the District Court would have been justified in enjoining the Commission's orders.

The Price Administrator, however, with full opportunity to do so, neither presented nor tendered a word of evidence in this respect. On the contrary, the Price Administrator, in his exceptions to the Examiner's proposed report[1] preceding the Commission's order of June 8, 1943, which proposed report recommended that a 10 cent fare be authorized on appellant's downtown line, expressly conceded that

> "We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine."[2]

It is true that in those exceptions the Price Administrator did argue that such increase in fare, together with other increased costs of living, would result in what the Price Administrator termed an "inflationary spiral". At no time, however, did the Price Administrator present or offer any evidence whatever to support this argument, either as to what were such other increased costs of living, or as to how such increased costs of living, combined with appellant's proposed increased fare, could result in an "inflationary spiral". Instead, the Price Administrator confined both his evidence and his efforts, except for desultory references to the question of inflation, to an attempt to show that under the Interstate Commerce Act the Commission was not justified in permitting any increase in appellant's present 8 cent fare.

Paradoxically, it was the Price Administrator, who had no legal interest in this question, who alone made a

---

[1] H. & M. Ex. D-8.
[2] R. 378.

proper tender of such evidence to the Commission by his motion of October 14, 1943, asking the Commission to broaden its order of reopening of September 18, 1943 to receive such evidence. Jersey City, it has been shown, not only failed properly to join in such motion, but was estopped to do so.

That the Price Administrator had no standing before the Commission entitling him to tender such evidence, and that the Commission's refusal to receive such evidence could not therefore constitute a denial of full and fair hearing to the Price Administrator, is clear from the opinion of this Court in *Vinson et al.* v. *Washington Gas Light Company et al.*, decided March 27, 1944, U. S.

Indeed, so far as the Price Administrator is concerned, his case is on all fours with the *Washington Gas Light* case, except for the unessential distinction that here orders of the Interstate Commerce Commission relating to fares of a common carrier were involved, while there orders of the Public Utilities Commission of the District of Columbia relating to rates of a public utility were in question.

Moreover, appellant in the present case, not content with the Price Administrator's disclaimer[1] that appellant's proposed increased fares could result in inflation, itself made an affirmative showing to the contrary.[2]

Appellant showed before the Interstate Commerce Commission that even its proposed straight 10 cent fare on its downtown line, which the Commission refused to authorize either by its orders of June 8, or November 2, 1943, could result in a maximum increase in living costs

---

[1]R. 378.

[2]H. & M. Ex. D-10.

to passengers on its downtown line of $12.48 a year or $1.04 a month, and that such maximum would apply only to daily passengers making round trip use of that line six days of every week of the entire year. Moreover, appellant showed before the Commission that such maximum increase would apply to not more, and probably to substantially less, than 45 per cent. of all passengers using appellant's downtown line.

Obviously the maximum increases under the 9 cent fare of the downtown line authorized by the Commission's order of June 8, 1943, or under the alternative fares of 11 tokens for $1 or a cash fare of a dime authorized by the Commission's order of November 2, 1943, would be proportionately less. Furthermore, since the Commission's order of November 2, 1943 required such alternative fares to be made applicable also to appellant's uptown line, on which the authorized and existing fare is now 10 cents, the cost of living of passengers using appellant's uptown line would, under that order, be proportionately reduced in the direct ratio to which they availed themselves of the right to buy tokens sold at 11 for $1 instead of paying a cash fare of a dime.

In addition, however, appellant pointed out to the Commission that primarily, at least, an increase in passenger fares, unlike an increase in freight rates, is deflationary instead of inflationary, since it takes money out of the commodity market and cannot, like increased freight rates, be added to commodity prices.

Appellant pointed out that increased passenger fares could only have an inflationary result if their purpose and actual effect were (a) to permit payment of further increases in wages to the carrier's employees; (b) to permit

the carrier to pay competitively higher prices to secure limited materials; (c) to permit the carrier to pay dividends on stock not theretofore paid; (d) to permit the carrier to pay interest on its bonded indebtedness to an extent not theretofore currently paid; (e) to increase the living costs of the carrier's passengers to a point which, and under circumstances such as, would require a general increase in the wages of such passengers.

In connection with the foregoing, appellant pointed out that the purpose and effect of its proposed increased fares was not to permit further increased wages, but to meet increases already granted; that it could not pay competitively higher prices for limited materials because of ceilings fixed by the Price Administrator; that it could not pay any dividends on its stock until it first paid off approximately 5½ million dollars of cumulative and unpaid interest on its Adjustment Income Bonds; that it had always paid and was now paying full interest on its First Mortgage and First and Refunding bonds; that even if it were able to pay the full 5% interest on its Adjustment Income Bonds, the additional payment on such bonds over the average interest now paid, distributed among the 5,300 holders of them, would amount to something less than $100 per year.

Finally, appellant pointed out that such increased fares could not possibly result in such increased living costs to its passengers as would require a general increase in the wages of such passengers; first, because there is no known basis of wages, per hour, per day, per week, or per month, which would require or permit the reflection of a maximum increase of living cost of $12.48 a year; second, because there was no evidence as to how many of appellant's pas-

sengers were wage earners, or if they were, in what manner they were concentrated or diffused among industries and wage groups.

Here, perhaps, is as good a place as any to dispose of the second ground upon which the District Court undertook to justify its injunction against appellant's increased fares authorized by the Commission's enjoined orders. That ground, as already noted, is that the Commission too "lightly brushed aside" the Price Administrator's contentions that the Commission's orders granting such increased fares violated the national emergency policy of economic stabilization.

In spite of the failure of the Price Administrator to offer any evidence whatever in this respect, of his concession that appellant's increased fares could not themselves result in inflation, and of appellant's affirmative showing that they could not possibly do so, the Commission nevertheless gave detailed and lengthy consideration to the Price Administrator's contention that such increased fares in connection with other increased living costs might result in an "inflationary spiral".[1] Moreover the Commission did so although, obviously, such other increased living costs were in the control of the Price Administrator himself, and increases permitted in them and not the increases in appellant's fares would be responsible for any "inflationary spiral".

In both of its enjoined reports the Commission reached the conclusion that the increased fares which it authorized

---

[1]See report of June 8, 1943 (R. 248-272) at R. 265-267, 270-271, and report of November 2, 1943 (R. 272-285) at R. 282-283.

could not result in inflation or increased cost of living, in contravention either of the Emergency Price Control Act or of the Inflation Control Act. There being ample evidence to support the Commission's finding in these respects, and no evidence whatever to the contrary, it is submitted that the second ground on which the District Court enjoined the Commission's orders is wholly frivolous.

V

THE COMMISSION'S ORDERS OF JUNE 8, 1943, AND NOVEMBER 2, 1943, ARE FULLY SUPPORTED BY THE FINDINGS OF THE COMMISSION WHICH, IN TURN, ARE FULLY SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

This Court has held repeatedly that, in reviewing an order of the Interstate Commerce Commission, a court has no authority to consider the weight of the evidence, the soundness of the Commission's reasoning, or the wisdom of its action,[1] and that a court may not substitute its judgment for the findings and conclusions of the Commission.[2] The sole function of the court is to determine whether the Commission in making the order acted within its power,[3] whether there was any substantial evidence to support its basic find-

---

[1] *Virginian Ry. Co. v. United States*, 272 U. S. 658, 666; *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271.

[2] *United States* v. *New River Co.*, 265 U. S. 533, 542.

[3] *Interstate Commerce Commission* v. *Union Pacific R. Co.* 222 U. S. 541, 546, 547-548.

ings,[1] and whether it made the findings requisite to support its order,[2]

The proceedings before the Commission in 1942 and 1943 which led up to the entry of the two orders herein enjoined were a reopening of the proceedings before the Commission in 1937 which had led up to the Commission's order of July 11, 1938, approving a fare of 8 cents on the appellant's downtown line. The order of July 11, 1938 was entered after a full and elaborate hearing, at which more than a score of witnesses were heard, and more than a hundred exhibits were received in evidence.[3] The Commission had before it in the 1937 proceedings, among other relevant facts, evidence describing the service rendered by the appellant, the costs of the appellant's railroad properties, the appellant's operating expenses and revenues from 1919 to 1937, statistics showing the total number of passengers carried by the appellant in each year since 1919 on the uptown line, on the downtown line and under joint arrangements with other carriers, a comparison of these statistics with similar statistics for the principal trunk-line railroads reaching New York City by way of New Jersey, and a mass of data as to the fares on the New York City subways, the bus fares over the George Washington Bridge and through

---

[1] *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92.

[2] *Florida* v. *United States*, 282 U. S. 194, 215; *Hudson & Manhattan Railroad Co.* v. *United States et al.*, 313 U. S. 98.

[3] The hearings occupied all or part of six separate days (including one evening session), and the testimony and argument required 1010 typewritten pages of transcript. See transcript of record to this Court in *Hudson & Manhattan Railroad Company* v. *The United States of America et al*, October Term 1940, No. 628, at R. 195-886.

the Hudson Tunnels, the commutation fares of the trunk-line railroads, and the fares on the ferries.[1]

At the hearings in 1942, the record of the 1937 proceedings was brought up to date, and much new evidence, relating primarily to changes in conditions between 1937 and 1942, was adduced. Again various witnesses were called on behalf of the appellant railroad company and on behalf of the protestants, and approximately one hundred supplemental or additional exhibits were received in evidence.[2] At the reopened hearings in September, 1943, further testimony was taken and some thirteen additional exhibits were received in evidence.[3]

The reports and orders herein enjoined contain a careful summary and analysis by the Commission of the evidence adduced before it which the Commission regarded as most important. It is evident from a mere reading of these detailed reports that, in the "mass of facts" of record before the Commission, there was "that out of which experts could have named a rate".[4] As this Court said in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, "The law makes the Commission's finding on such facts conclusive."[5]

---

[1]Transcript of record to this Court in *Hudson & Manhattan Railroad Co.* v. *United States of America et al*, October Term 1940, No. 628.

[2]The hearings occupied all or part of eight separate days, and the testimony and argument required 1020 typewritten pages of transcript (Tr. 1011-2030). See stipulation with respect to printing of record (R. 417-433), at R. 420-431.

[3]The reopened hearings occupied two full days, and the testimony and argument required 445 typewritten pages of transcript (Tr. 2032-2477). See stipulation with respect to printing of record (R. 417-433), at R. 420, 431-433.

[4]*Interstate Commerce Commission* v. *Union Pacific R. Co.* 222 U. S. 541, 550.

[5]222 U. S. 541, 550.

A. The report and order of June 8, 1943.

The appellees did not seriously contend before the District Court that the basic findings which the Commission made in its report and order of June 8, 1943[1] were not supported by substantial evidence. Furthermore, and most significant, the District Court made no finding whatever that said order was not based on adequate findings or was without evidence to support it. On this state of the record, appellant could well rest upon the presumption of validity which attaches to an order of the Commission made after hearing and consideration.[2] However, in order that there may be no question as to the adequacy of the record on which the Commission entered its order of June 8, 1943, the basic findings of the Commission which support such order are briefly summarized below, and the evidence of record supporting such findings is indicated by footnotes.

(1) The Commission found that economic and competitive conditions affecting the appellant's traffic had changed materially since the Commission's report and order of July 11, 1938, in which it had concluded that the 10 cent fare then proposed on appellant's downtown line had not been justified but that a fare of 8 cents had been justified.[3] Among the material changes which the Commission found had occurred in the interim were:

(a) Appellant's total traffic had declined from 77,989,857 passengers in 1937 to 65,847,289 in 1941, or 15.57%, as a result of the continuance of the economic depression, increased competition of private automobiles

[1]R. 248-272.

[2]*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602.

[3]R. 268.

and motor buses using the George Washington Bridge and the Lincoln and Holland Tunnels, and later the closing of the 33rd Street Station on appellant's uptown line between December 25, 1937 and September 24, 1939, necessitated by the construction by the City of New York of its Sixth Avenue subway line.[1]

(b) The accrued and unpaid interest due on appellant's Adjustment Income Bonds had increased to $5,494,727 at December 31, 1941 (as compared with $2,118,746 as at December 31, 1937.)[2]

(c) Appellant's total operating expenses had increased in 1941 over 1937 by about $205,000, or 6.3%, primarily because of increased labor costs and taxes, although the number of car miles was reduced by 5.27%.[3]

(d) Aside from contingent increases in operating costs for materials, supplies and taxes due to the war, appellant's estimated annual operating costs for labor and for a reserve against war hazards (found by the Commission to be reasonable) will aggregate at least $466,500 per year in excess of such costs in 1941.[4]

(e) While appellant's traffic, both on its downtown line and as a whole, decreased between 1937 and 1941, war conditions have caused, and continue to cause, a steadily mounting increase of traffic.[5]

---

[1]Finding, R. 254; evidence: Tr. 1133-6, 1154, 1164, 1168-71, 1347; Tr. Exs. 5-R, 36-R.

[2]Finding, R. 251; evidence: Tr. 1140; Tr. Exs. 26-R, 26-R Supp.

[3]Finding, R. 254; evidence: Tr. 1137-9, 1178-80; Tr. Ex. B.

[4]Finding, R. 255, 267; evidence: Tr. 1261-5, 1326-7.

[5]Finding, R. 254-255; evidence: Tr. 1141-4, 1185-7, 1458-9, 1462, 1815; Tr. Exs. A, A Supp., C.

(f) The conditions which the Commission found had motivated the decline in appellant's traffic prior to 1938 have been materially changed by the incidence of war conditions.[1]

(g) The two factors which tended to increase the possibilities of diversion when appellant's downtown fare was increased from 6 cents to 8 cents have been eliminated. The possibility of direct bus service between metropolitan New Jersey and downtown Manhattan was eliminated by the decision of the Commission in *New Jersey-New York Bus Applications*, 23 M. C. C. 219, denying applications for certificates to inaugurate such service. The curtailment of private car competition, due to war conditions, eliminated possible diversion to this means of transportation.[2]

(2) The Commission found that the capital securities of appellant outstanding as of August 31, 1942, and allocable to its railroad properties were $50,889,418 of funded debt and $37,557,459 of stock. Such funded debt consisted of $783,520 of First Mortgage 4½% Bonds, $26,572,948 of First Lien and Refunding 5% Bonds, and $23,542,950 of Adjustment Income 5% Bonds.[3]

(3) The Commission found that the cost of appellant's railroad properties, less retirements, as of August 31, 1942, was $66,541,352, and that the reproduction cost of its rail-

---

[1]Finding, R. 254-255; evidence: Tr. 1141-4.

[2]Finding, R. 257; evidence: Tr. 1141, 1259-60, 1280-2, 1815.

[3]Finding, R. 251; evidence: Tr. 1035, 1037; Tr. Exs. 26-R 26-R Supp.

road properties new, on the basis of 1914 prices, less depreciation, had been about $68,273,000 in 1937.[1]

(4) The Commission found that since 1932 appellant had failed to earn its bond interest by amounts which varied from $279,078 in 1934 to $655,164 in 1937, $1,113,350 in 1938, $806,848 in 1939, $817,424 in 1940 and $892,148 in 1941. The accumulated and unpaid interest on appellant's Adjustment Income Bonds as of December 31, 1941, was $5,494,727.[2]

(5) The Commission found that appellant had paid no dividends on its stock since 1933 and that under the provisions of its Adjustment Income Mortgage no dividends can be paid until all current and accumulated interest on its Adjustment Income Bonds has been paid.[3]

(6) The Commission found that in the period from 1919 to 1942, the outstanding securities of appellant allocable to its railroad properties had been reduced in net amount by $17,674,356 (largely through the purchase of its own bonds at heavy discounts, through the application of funded reserves), and that appellant had thereby effected a total saving of $6,495,696 and future savings at the rate of $427,000 per annum in interest charges.[4]

(7) The Commission found that, under a 9 cent fare on appellant's downtown line (assuming an increase over 1941

---

[1]Finding, R. 252; evidence: Tr. 224-7, 1035; Tr. Exs. 25-R, 31.

[2]Finding, R. 251; evidence: Tr. 1139-40; Tr. Exs. 26-R, 26-R Supp.

[3]Finding, R. 251; evidence: Tr. 397, 1274; Tr. Exs. 26, 26-R, 28, 28-R.

[4]Finding, R. 252; evidence: Tr. 1140, 1833-55; Tr. Ex. 26-R.

on downtown local traffic due to the war of 12.67%, a 5% diversion of such traffic by reason of the increase in the fare, and making allowance for reduced out of pocket expenses because of such diversion), appellant's resulting net income available for bond interest would approximate $2,404,502 (which is $186,552 *less* than full interest on appellant's Adjustment Income Bonds).[1]

(8) The Commission found that in order to meet increased operating expenses and the interest on its bonds, the appellant was in need of additional revenue beyond that which might be expected from its present fares and divisions, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents, during the remaining period of the war and for six months after its termination.[2]

(9) The Commission found that appellant would have had the right, by reason of the Commission's decision in *Ex Parte 148,* to increase the fare on its downtown line from 8 cents to 9 cents, and that, since appellant had been affected by the same conditions making for higher operating expenses as the Commission had taken into account in authorizing a general increase in railroad passenger fares, the 9 cent fare on the downtown line authorized by the Commission was consistent with its decision in *Ex Parte 148.*[3]

---

[1]Finding, R. 269; evidence: Tr. 1132, 1137-9, 1152-88, 1195-6, 1249, 1261-5, 1653-4; Tr. Exs. 26-R, 26-R Supp., 30-R, 30-R Supp. sh. 3, 36-R, 36-R Supp., A, A Supp., B, G.

[2]Finding, R. 271; evidence: Tr. 1181-3, 1195-6, 1261-9, 1274, 1282-3; Tr. Ex. G.

[3]Finding, R. 250, 256, 270; evidence: Tr. 1119-20, 1121-32; *Increased Railway Rates, Fares, and Charges,* 1942, 248 I. C. C. 545.

(10) The Commission found that the increase in fare on the downtown line from 8 cents to 9 cents would not have any inflationary effect and would not be in conflict with the National Emergency Price Control Act of 1942, as amended.[1]

B. The report and order of November 2, 1943.

As in the case of the order of June 8, 1943, the District Court made no finding whatever that the Commission's order of November 2, 1943, was not based on adequate findings or was without evidence to support such findings. Again, in order that there may be no question as to the adequacy of the record on which the Commission entered its order of November 2, 1943, the evidence of record supporting the Commission's findings is briefly summarized below, under the basic findings made by the Commission.

"1. It is impracticable for respondent to collect a cash fare of 9 cents."[2]

There is no conflict in the evidence or real dispute between the parties as to appellant's inability to collect and count a 9 cent cash fare with its present fare collection boxes or with any other known fare collection mechanism. The testimony of Mr. Brown, Chairman of the Board and President of the appellant, and of Mr. Nahm, representing the manufacturer of the fare collection boxes, is practically uncontroverted on this point.[3]

The only objection which the appellees made to the finding of the Commission as to the impracticability of col-

[1]Finding, R. 270-271; evidence: Tr. 1556-7, R. 376-379, H. & M. Ex. D-10.
[2]R. 276-277.
[3]Tr. 2039-41; 2234-7.

lecting a 9 cent cash fare was the contention of Jersey City that the Commission disregarded evidence that the 9 cent cash fare could be collected by removing the coin-counting mechanism from the collection boxes.[1] Far from disregarding this possibility, the Commission in its report of November 2, 1943, expressly found:

> "The counting mechanism of these boxes is indispensible to the efficient operation of respondent's railroad, first, so as to provide a check on the efficiency of the fare-box attendant in observing the deposit of the fares; second, to provide a check against the subsequent count of the fares in respondent's coin-counting room; third, to prevent the necessity of an impracticable guarding of the sealed coin-collection cans between the time they are removed from the fare boxes and the time they are received in the counting room; and fourth, to provide the railroad with the traffic check necessary to control its train schedules and service by determining the volume of the incoming traffic during typical periods and thus make available the data essential to the control of train operations."[2]

This finding is amply supported by the record.[3]

Since the practicability of removing the counting mechanism from the collection boxes was clearly a question of fact for the Commission to determine, and since the finding of the Commission on this point is fully supported by the evidence, the appellees cannot obtain a review of said finding in this Court.

---

[1] See paragraph 27 of Jersey City's amended complaint, R. 37.
[2] R. 277.
[3] Tr. 2318-21; 2328-32.

"2. There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens."[1]

Mr. Brown and Mr. Van Gieson, General Superintendent of the appellant, testified in detail as to the investigation made by them before reaching the conclusion that the only feasible method of substantial compliance with the Commission's authorization of a 9 cent fare on appellant's downtown line was by the use of alternative fares of 11 tokens for $1 or a cash fare of a dime.[2] Based on such evidence, the Commission made the following findings as to the impossibility of collecting a 9 cent fare by any other method:

> "Other methods of collecting a fare of 9 cents considered and rejected by respondent were the following: (a) By requiring the passenger to deposit initially a dime and to receive a contemporaneous refund of 1 cent from the fare-box attendant. The attendant, at least during the peak-traffic periods, could not watch the coins drop into the fare box and at the same time make change. Such attendants, the number of which would have to be at least doubled, would have to be furnished with about 125,000 pennies each business day. The attendants could not be certain that the penny refund would not be made to the uptown as well as the downtown passengers.
>
> "(b) By the use of weekly or monthly passes or commutation tickets. Such passes or tickets could not be policed during the rush hours, and their attempted inspection by station attendants would entail too much delay to passengers.

[1]R. 277.
[2]Tr. 2042-48; 2288-2317.

"(c) By the use of single-trip or multiple-trip tickets. The fare boxes are not adapted to effect the necessary cancellation of such tickets, and cancellation machinery cannot be obtained under the present war conditions. Other rapid-transit companies in the New York area have abandoned the use of such tickets because there are means by which cancellations can be eradicated and the tickets reused, such strips as deposited by groups of passengers may be abstracted from the box by the attendant, and when tickets are sold in strips they may be torn short by the purchaser so as to provide more tickets than were sold. Moreover, the sale of single tickets, with the necessity for making change, would result in serious congestion and delays to passengers during the peak-traffic periods."[1]

These findings, being supported by evidence, are not subject to review by this Court.

"3. The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable."[2]

This finding is based upon evidence showing that, when a passenger enters a station in New Jersey, it is impossible for appellant to determine whether such passenger intends to use its uptown or its downtown line. Any passenger would therefore be able to enter a New Jersey station by depositing a token. If appellant should retain its present 10 cent fare on its uptown line as its only fare on such line, it would also have to retain its present facilities for collecting on exit at uptown stations the 1 cent balance of such

[1]R. 277-278.

[2]R. 278. See also report of August 3, 1943 (R. 313-326) at R. 316-317.

10 cent fare. An additional complication would be presented if a passenger intending to use the uptown line instead of depositing a token at New Jersey stations should deposit a dime. The appellant then would have to issue to such passenger an exit coupon which would permit him to leave a station on its uptown line without payment of an additional fare, or would have to refund him 1 cent which he would have then to surrender on exit at an uptown station. Either method would require such passenger to indicate to the fare collection box attendant at the New Jersey station that he was depositing a dime and not a token and was therefore entitled to an exit coupon or to a refund of 1 cent. This would necessarily retard the entrance of other passengers at such fare collection box. Moreover, it would be extremely difficult to police the proper issuance and use of such free exit coupons or the making of such 1 cent refunds. The appellant would thus not only risk the loss of substantial revenue but would have to retain its present exit fare facilities and attendants at uptown stations and provide augmented station forces to handle the sale of tokens.[1]

"4. The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation service."[2]

Having found that the appellant could not collect a 9 cent cash fare by the use of its present fare-collection

[1]Tr. 2042-48; 2288-2317.
[2]R. 278-282.

method or by the use of any other practicable method, the Commission found that the alternative dime and token fare, applicable both to the uptown and downtown lines of the appellant, was the only practicable method which would produce the additional revenue to be accorded by its June 8, 1943 order. In its report and findings of June 8, 1943, the Commission had found that the increase in the downtown fare to 9 cents thereby authorized would not provide the appellant with net income sufficient to pay full interest on its Adjustment Income Bonds.[1] In fact, the net income which the Commission estimated a 9 cent fare would produce would fall $186,552 short of the amount required for that purpose.[1] In its report and findings of November 2, 1943, the Commission found that the proposed alternative token and dime fares could be expected to bring to the appellant at least *no greater gross or net revenue* than would result from cash fares of 10 cents on the uptown line and 9 cents on the downtown line, if both such fares were collectible.[2]

The evidence of record fully supports the foregoing findings.[3] The only counter evidence offered by any party at the hearings of September 28 and September 29, 1943, was the statistical evidence comprised by Exhibit F-142,[4] presented by the Price Administrator, and the testimony of his witness, Mr. David A. Kosh, with reference thereto.[5] That exhibit and testimony were directed solely to an effort to refute the appellant's estimate that 90% of its passengers would avail themselves of the lower token fare of 9¼1

[1]R. 269.
[2]R. 279.
[3]Tr. 2048-55; 2133; 2210-11; 2383-4; Tr. Exs. F-147, F-148, F-149, F-150.
[4]Report for 1937 of Committee on Fare Structures of the American Transit Association, Tr. Ex. F-142.
[5]Tr. 2424-41.

cents per ride and that 10% would pay the higher cash fare of a dime, which estimate the Commission had stated in its report of August 3, 1943, might be accepted as reasonable.[1]

The Commission's report of November 2, 1943, discusses the evidence on this point in some detail,[2] and clearly indicates the weight accorded by the Commission to all such evidence. After analyzing, weighing and considering the evidence, the Commission concluded in its report that:

> "Even if the actual use ratio under the proposed basis should prove to be 70 percent tokens and 30 percent dimes, respondent's revenue would, within about $15,000, approximate that anticipated by our findings in the second report, based upon the number of local interstate passengers carried in the first 8 months of 1943, adjusted to a 12-month basis, and allowing for a 5 percent diversion by reason of the fare increase on the downtown line, but making no allowance for the increased number of passengers which could be expected to be drawn to the uptown line by reason of the fare reduction thereon. Moreover, as indicated, it is likely that the traffic characteristics on the lines of respondent differ greatly from those on the lines of the other companies referred to of record, and therefore the 90-10 percent use ratio urged by respondent appears to us to be within the range of probable achievement under the proposed fare basis."[3]

The determination by the Commission of these questions of fact is not open to review by this Court.

Appellees urged before the District Court that the Commission had acted arbitrarily and capriciously in permitting

---

[1]R. 322.
[2]R. 279-282.
[3]R. 281-282.

an increase in fares on the downtown line, notwithstanding appellant's failure to heed the "directive" of the Commission to obtain additional revenue from the Pennsylvania Railroad through increased divisions on interline traffic. The parties went into this question thoroughly before the Commission, both at the hearings and at the oral argument. There, as before the District Court, appellees argued that the suggestion of the Commission in its report of July 11, 1938, that

> "If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic",[1]

was a mandatory "directive" by the Commission, which this Court had upheld in *Hudson & Manhattan Railroad Company* v. *United States, et al.*, 313 U. S. 98.

At the hearings before the Commission, appellant introduced extensive testimony to the effect that the continuance of the 8 cent fare on the downtown line presented a practical obstacle to obtaining higher divisions from the Pennsylvania Railroad on the joint service, and showing the impossibility, in any event, of meeting the entire revenue needs of the appellant through any increased divisions that might reasonably be expected.[2] In this connection, the Commission's report, findings and order of June 8, 1943, after finding that the appellant was in need of additional revenue beyond that which might be expected from its present fares and divisions, expressly found that "a portion of such additional revenue can reasonably, and

---

[1]R. 311.

[2]Tr. 1269-73; 1286-1313.

should, be obtained by increasing its downtown fare from 8 to 9 cents."[1] This finding clearly contemplated that the appellant should obtain the remaining "portion of such additional revenue" from increased divisions on interline traffic, and the appellant has indicated to the Commission that it intends to seek such increased divisions and has had preliminary talks on the subject with representatives of the Pennsylvania Railroad.[2] If there is any question of fact in this case upon which the Commission has the last word, it is the proper construction of its own suggestion regarding increased revenue from interline traffic, and the extent to which it will require compliance with that suggestion before an increase in fare will be authorized. As the Commission's decision to authorize the increase without requiring compliance with its suggestion is supported by evidence, no review of that decision can be had in this Court.

Appellees also urged before the District Court that the Commission had acted arbitrarily and in disregard of the evidence by permitting an increased burden upon appellant's downtown passengers, notwithstanding the Commission's previous statements to the effect "that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers." As pointed out above, the Commission did not in fact authorize "the entire burden of the revenue increase" to be borne by the downtown local passengers. The Commission's findings in its report and order of November 2, 1943, that the proposed alternative token and dime fares could be expected to yield no greater

[1]R. 271.
[2]Tr. 1309; 2074; 2105-14.

gross or net revenue than would result from cash fares of 10 cents uptown and 9 cents downtown (which fares the Commission had found would not yield net income sufficient to pay full interest on appellant's Adjustment Income Bonds) makes it clear that, even after the alternative dime and token fares go into effect, there still will remain a substantial portion of the revenue increase to which the appellant is entitled which must be sought from sources other than its downtown traffic, including increased divisions on the interline traffic.

"5. The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act."[1]

We have pointed out above that neither of the appellees introduced or offered to introduce any evidence with respect to the possible inflationary effect of an increase in the fare on the appellant's downtown line, although afforded ample opportunity to do so. Despite the complete lack of any evidence on this point, the Commission nevertheless gave careful consideration to the argumentative contentions of the Price Administrator that the proposed increase in fare would conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act. The reports of June 8, 1943 and November 2, 1943 both show that the Commission gave careful consideration to the purposes of the stabilization legislation, and reached the conclusion on the record before it that the proposed fare increase would

[1]R. 282-283.

not conflict with such legislation.[1] Even though this Court might decide that it would have reached a different determination on the same facts, it cannot substitute its judgment for the judgment of the Commission.

"6. A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally."[2]

In this connection, the Commission made it clear that when it authorized a 9 cent fare by its order of June 8, 1943, it was concerned primarily with fares to be paid by appellant's regular daily patrons.[3] The practice of charging occasional passengers higher fares than those paid by regular passengers is, of course, the rule, rather than the exception, among carriers. As the Commission points out in its report of November 2, 1943, a minimum fare of 10 cents is the fare prescribed by the Commission for railroads generally for passengers who ride only occasionally in commutation equipment.[4] The Commission's determination that a 10 cent fare for the occasional passenger on appellant's lines is a reasonable charge is supported by the evidence of record.[5]

The appellees urged before the District Court that the Commission had acted arbitrarily and capriciously in prescribing the same fares for both the uptown and downtown

[1]R. 265-267, 270-271, 282-283.
[2]R. 283.
[3]R. 283, 323.
[4]R. 283.
[5]Tr. Exs. 36-R, G, F-102.

lines, in disregard of the previous "findings" of the Commission and of this Court "on precisely the same factual situation". The fact is, of course, that in its prior decision this Court did not purport to pass upon the proper relationships between fares on appellant's uptown and downtown lines; all this Court held was that, since there was evidence to support the Commission's findings and its findings supported its 1938 order, the Commission's order should be affirmed. The only finding which the Commission made in 1938 was that 10 cents was a maximum reasonable fare on the uptown line *at that time*. In its reports, findings and orders of June 8, 1943, and August 3, 1943, the Commission held that, in view of the 10% general fare increase authorized in *Ex parte 148* by reason of increased operating expenses, to which appellant had also been subjected, the maximum reasonable fare on the uptown line is now 11 cents.[1] No one could contend that the 9⅟11 cent token fare on the uptown line, which is less than the maximum reasonable fare on that line, is an unreasonable fare. As the 9⅟11 cent token fare on the downtown line authorized by the order of November 2, 1943, also is less than the 11 cent maximum reasonable fare on the uptown line, such token fare on the downtown line is, therefore, still a reasonable fare within the meaning of the Commission's statement in 1938.

CONCLUSION

We have shown in this brief that the Commission, as the expert body charged by the Congress with prescribing just and reasonable fares for appellant's railroad, concluded

---

[1] R. 256, 320-321, 323.

in its report of June 8, 1943, after extensive hearings, that appellant was in need of additional revenue, and that a portion of such additional revenue should be obtained by increasing the fare on its downtown line from 8 cents to 9 cents during the remaining period of the war and for six months after its termination. We have also shown that the Commission in its further report of November 2, 1943, after a further hearing limited to the only relevant issue, modified its prior order to the extent of permitting appellant to charge alternative fares of 11 tokens for $1 or a cash fare of a dime on its downtown line, provided that such alternative fares were also made applicable to appellant's uptown line, as the only practicable method by which appellant could reasonably be expected to obtain the increased revenues contemplated by the Commission's prior report. In so doing the Commission, well aware of the fact that its order was "not an order for all time",[1] frankly acknowledged in its report of November 2, 1943 that

> "The only way, of course, in which the effect of the proposed fare basis, either upon the public in convenience of use or upon the respondent in revenue results, can be ascertained without the uncertainties necessarily inherent in predictions of traffic or revenue results, is by giving the basis a fair trial."[2]

We have further shown that appellees were unwilling to permit a fair trial to be given to the alternative fares which had been approved by the Commission, and that instead they rushed into the District Court and succeeded in

---

[1] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 615. See *Acker* v. *United States*, 298 U. S. 426, 433.
[2] R. 282.

obtaining an injunction against the Commission's orders, despite the fact that such orders were based on adequate findings supported by substantial evidence.

The essential issue which this case presents to this Court is whether the Commission shall be permitted to exercise the regulatory functions entrusted to it by the Congress, without unwarranted interference by the courts with its administrative discretion. We submit that on the record herein both the appellant and the Commission are entitled to a fair trial of the proposed fares which the Commission has found to be reasonable, and that to this end this Court should reverse the order of the District Court.

Respectfully submitted,

JOHN F. FINERTY,
Counsel for Appellant
Hudson & Manhattan Railroad Company.

JOHN E. BUCK,
THOMAS A. HALLERAN,
CRAVATH, SWAINE & MOORE,
Of Counsel.

APPENDIX 1

INTERSTATE COMMERCE ACT, Sections 1(1), 1(5)(a), 15a (49 U. S. C., Secs. 1, 15, 15a):

SECTION 1(1) *"Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *"

SECTION 1(5) *"Just and reasonable charges required; classification of messages, and rates; exchange of services.* (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SECTION 15a *"Fair return for carriers.* (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto."

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. * * *"

Appendix 1

EMERGENCY PRICE CONTROL ACT OF 1942, 56 STAT. 23:

SECTION 1(a)(50 U. S. C. App., Supp. II, §901(a)):

"It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *"

SECTION 302(c) (50 U. S. C. App., Supp. II, §942(c)):

"* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) com-

pensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *."

INFLATION CONTROL ACT (STABILIZATION ACT) OF OCTOBER 2, 1942, 56 STAT. 765:

"That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

SECTION 2: "The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3(a) and 3(c), and clause (1) of section 302(c), of the Emergency Price Control Act of 1942 to the

extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof."

SECTION 7: "* * * (c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulation, price schedule, or order issued or effective under such Act."

INTERSTATE COMMERCE COMMISSION, GENERAL RULES OF PRACTICE:

"Rehearing; Reargument; or Reconsideration.

"Rule 101. *Petitions for rehearing, reargument, or reconsideration.*

"(a) *In General.* A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

"(b) *Rehearing or further hearing.* When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

"(c) *Modification of effective date.* A petition under this rule seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of

unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

"(d) *Reconsideration.* If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

"(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

"(f) *Successive petitions on same grounds, not entertained.* A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained."

APPENDIX 2

Description of Appellant's Railroad

Appellant is a common carrier by railroad, engaged in the transportation of passengers in interstate commerce, and is subject to the provisions of the Interstate Commerce Act, U. S. C., Title 49, Section 1, par (1) (R. 159-160).[1]

Appellant's railroad properties[2] consist of an underground rapid transit passenger railway, operated exclusively by electric power and furnishing transportation facilities between points in uptown and downtown New York City and points in Jersey City and Hoboken, New Jersey (R. 87). Appellant's railroad properties comprise about 8½ miles of railroad, of which all but about ½ mile is tunnel railroad underground (R. 87). A small scale map showing appellant's railroad properties appears opposite page 1 of this brief. Appellant's railroad properties include:

First. A line, which crosses under the Hudson River by two parallel tunnels between appellant's downtown terminal at Hudson Terminal, at Church Street (between Cortlandt and Fulton Streets), New York City, and appellant's station at the terminal of the Pennsylvania Railroad at Exchange Place, Jersey City, and extends west in Jersey

---

[1]Record references in this Appendix are to the printed Transcript of Record before this Court filed December 13, 1940, in the action entitled "Hudson & Manhattan Railroad Company, Appellant, v. The United States of America, Interstate Commerce Commission and the City of Jersey City, Appellees, October Term 1940, No. 628" which, pursuant to the stipulation between the parties (R. 417-433) is deemed to be before this Court on the present appeal.

[2]In addition to its railroad properties, appellant owns and operates two twenty-two story office buildings erected over its downtown railroad terminal in New York City and other miscellaneous real estate not employed in railroad operations. There is no dispute as to the propriety of the allocation of appellant's investment, bonded indebtedness and income as between its railroad properties and its non-railroad properties (R. 90, 95).

City from Exchange Place, through a station at Grove and Henderson Streets, to a station at Journal Square, Jersey City (R. 87, 160);

Second. A line which crosses under the Hudson River by two parallel tunnels between appellant's station, at the terminal of the Delaware, Lackawanna & Western Railroad, in Hoboken, and appellant's station at Christopher Street, New York City, and from the latter station extends uptown under Sixth Avenue (with stations at 9th, 14th, 19th and 23rd Streets) to appellant's terminal at 33rd Street and Sixth Avenue (R. 87, 16); and

Third. A north and south line on the New Jersey side of the Hudson River, approximately parallel with the River, and extending from a junction with said first mentioned line, at a point between appellant's Exchange Place Station and appellant's Grove and Henderson Streets station in Jersey City, to a junction with said second mentioned line, at a point near appellant's station in Hoboken, this line having a station at the terminal of the Erie Railroad in Jersey City (R. 87, 160-1).

Appellant operates its trains in two services known, respectively, as its downtown service or downtown line and as its uptown service or uptown line (R. 161).

On the downtown line the trains operate (a) between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Journal Square, Jersey City, with stops at appellant's stations at Exchange Place, Jersey City, and Grove and Henderson Streets, Jersey City, and (b) between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Hoboken, New Jersey, with stops at appellant's stations at Exchange Place, Jersey City, and Erie Station, Jersey City (R. 161).

On the uptown line the trains operate (a) between appellant's station at Hoboken, New Jersey, and appellant's uptown terminal on Sixth Avenue, New York City, with

stops at appellant's stations at Christopher Street, New York City, and at 9th, 14th, 19th and 23rd Streets, under Sixth Avenue, New York City, and (b) between appellant's station at Journal Square, Jersey City, and appellant's uptown terminal on Sixth Avenue with stops at appellant's stations at Grove and Henderson Streets, Jersey City, and Erie Station, Jersey City, and at appellant's stations at Christopher Street and at 9th, 14th, 19th and 23rd Streets under Sixth Avenue, New York City (R. 161).

Appellant also operates, in conjunction with the Pennsylvania Railroad, a joint rapid transit electric train service between appellant's downtown terminal at Hudson Terminal, New York City, and the station of the Pennsylvania Railroad at Newark, New Jersey. The trains in this joint service operate over the appellant's line between appellant's downtown terminal at Hudson Terminal, New York City, and appellant's station at Journal Square, Jersey City, and from that point over a line owned by the Pennsylvania Railroad to the latter's station at Newark, New Jersey. Joint service passengers to and from appellant's stations on appellant's uptown line may transfer to and from joint service trains at appellant's station at Journal Square, Jersey City (R. 87-8, 161-2).

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 29 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,
Appellants,

vs.

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellees.

Appeal from the District Court of the United States for the District of New Jersey

BRIEF FOR APPELLEE, CITY OF JERSEY CITY

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.
City Hall,
Jersey City, N. J.

CHARLES HERSHENSTEIN,
Of Counsel.

SUBJECT MATTER INDEX.

PAGE

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

QUESTIONS PRESENTED 2

FACTS 4

(A) History of proposed ten cent local interstate fare culminating in order of June 11, 1938 (R. 286).. 4

(B) The order of June 8, 1943 (R. 248) and events leading up to the hearing of September 28, 1943.... 9

(C) The hearing of September 28, 1943, and report of November 2, 1943..... 13

SUMMARY OF ARGUMENT..... 20

ARGUMENT 21

1. The City of Jersey City and the Office of Price Administration were deprived of a full and fair hearing 21

(A) The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission because they were denied the right to introduce testimony and evidence under Section 15a. (2) which must form the basis for any revenue award under that section..... 25

(B) The appellees were deprived of a full and fair hearing before the Interstate Commerce Com-

PAGE

mission because they were denied the right to introduce testimony and evidence which the Commission in its report and order of June 8, 1943, invited them to do and which went directly to the basis of that order 33

2. By its hearing order of September 18, 1943, reopening the proceeding for further hearing on September 28, 1943, the Interstate Commerce Commission actually reopened the revenue phase of the proceeding 37

3. The Commission's order of November 2, 1943, makes findings of fact allegedly predicated upon the evidence of record. But neither the findings of fact nor the evidence of record are within the confines of the Commission's legal authority under Section 15a (2) 41

4. Before appellant railroad is entitled to any increased fares under the revenue section of the Act it must, among other factors, affirmatively establish its need of revenues sufficient to enable it, under honest, economical and efficient management to provide adequate service at the lowest cost consistent with such service 48

5. The imposition of a cash fare of ten cents for any downtown local service is unreasonable and unduly discriminatory and in violation of the Interstate Commerce Act 53

6. The appellees exhausted all administrative remedies before instituting proceedings in the District Court 55

PAGE

7. Jersey City was not estopped from either asking the Commission to receive the tendered evidence or from seeking an injunction based on the Commission's refusal to receive such evidence, nor is it estopped from seeking an injunction against the order of the Commission of June 8, 1943.... 59

Conclusion 63

TABLE OF CASES.

A. H. Belo Corp. v. Arkansas & L. M. Ry. Co., 160 I.C.C. 77 46

Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370..... 54

Armour & Company v. Central of Georgia Railway Company, 81 I.C.C. 33..... 45

Atchison, Topeka and Santa Fe Railway Co. v. United States, 284 U. S. 248.....23, 24

Baltimore & Ohio R. Co. v. United States, 298 U. S. 349 .....24, 25, 58

Coke Producers' Assn. of Connellsville v. Baltimore & O. R. Co., 271 I.C.C. 125..... 43

Commutation Fares to and from Washington, D. C., 35 I.C.C. 428..... 45

Consolidated Edison Company, et al. v. National Labor Relations Board, 305 U. S. 197, 229.....32, 44

Consolidated Southwestern Cases, 123 I.C.C. 203..... 43

PAGE

Cynamid and Crude Cyanide from Niagara Falls, 155 I.C.C. 488 46

East Dubuque Supply Company v. Illinois Central Railroad Company, 28 I.C.C. 425 45

E-Z-Opener Bag Co. v. Illinois Central R. Co., 160 I.C.C. 37 43

Hudson & M. R. Co. v. U. S., 28 Fed. Supp. 137 7

Hudson & Manhattan R. Co. v. United States, 313 U. S. 98 ..... 7, 9, 13, 44, 46, 49, 52

Hudson & M. R. Co. v. United States, 33 Fed. Supp. 495 ..... 7, 12, 49, 52

Illinois Cork Co. v. Akron C. & Y. Ry. Co., 200 I.C.C. 381 54

Increased Railway Rates, Fares and Charges, 1942, 248 I.C.C. 545 30

Increased Railway Rates, Fares and Charges, 1942, 255 I.C.C. 357 ..... 59, 61

Industrial Railways Case, 29 I.C.C. 212 27

Interchangeable Mileage Ticket Investigation, 71 I.C.C. 200 45

Interstate Commerce Commission v. Illinois Central Railroad, 215 U. S. 452, 470 33

Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U. S. 88 ..... 22, 24, 32, 33, 44, 47

Interstate Commerce Commission v. Louisville & N. R. Co., 73 F. 409 22

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547-548 ..... 32, 33

PAGE

Investigation & Suspension Docket No. 4394, Passenger Fares, Hudson & Manhattan Railroad..... 5

Linton Lbr. Co. v. Baltimore & O. R. Co., 177 I.C.C. 231 (232) 46

Local Fares of Hudson & Manhattan Railroad Company, 58 I.C.C. 270..... 5

Memphis-Southwestern Investigation, 55 I.C.C. 513... 45

Montana-Dakota Power Co. v. Chicago & N. W. Ry. Co., 198 I.C.C. 557 (563)..... 42

Mountain-Pacific Oil Cases, 192 I.C.C. 599..... 43

Natchez Chamber of Commerce v. Arkansas Harbor Terminal Railway Company, 58 I.C.C. 310..... 45

Natchez Chamber of Commerce v. Louisiana & Arkansas Railway Company, 52 I.C.C. 105..... 45

National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 299..... 33

New England Division Case, 261 U. S. 184..... 25

N. L. R. B. v. Thompson Products, Inc., 97 F (2d) 13, 15 (C.C.A. 6th, 1938)..... 33

O. A. Smith Agency, Inc. v. Atlantic Coast Line R. Co., 160 I.C.C. 61..... 46

Passenger Fares and Surcharges, 214 I.C.C. 174..... 45

Republic Creosoting Co. v. Akron, C. & Y. Ry. Co., 169 I.C.C. 161 46

Sawyer Goodman Co. v. Chicago, Mo., St. P. & P. R. Co., 168 I.C.C. 558 (580)..... 46

PAGE

Sinclair Crude Oil Purchasing Co. v. Atchison T. & S. F. Ry. Co., 168 I.C.C. 449 23

Sprigg v. Baltimore & Ohio Railroad Company, 8 I.C.C. 443 45

St. Louis-Missouri-Illinois Passenger Fares, 41 I.C.C. 584 45

Texas, Etc. R. Co. v. Interstate Commerce Commission, 162 U. S. 197 22

The Chicago Junction Case, 264 U. S. 258, 265 32

The Commutation Rate Case, 21 I.C.C. 426 45

United States v. Northern Pac. Ry. Co., 288 U. S. 490 ..... 24, 42

Virginian Railway Company v. United States, 272 U. S. 658, 663, 665-666 44

Welch & Welch v. Southern Pac. Co., 142 I.C.C. 267 43

Western Paper Makers' Chemical Company v. United States, 271 U. S. 268, 270-271 44

W. P. Brown & Sons Lbr. Co., Inc. v. Mobile & O. R. Co., 181 I.C.C. 298 46

York Valley Lime & Stone Company, Inc. v. Pennsylvania Railroad Company, 186 I.C.C. 763 45

TABLE OF ACTS.

Interstate Commerce Act (U.S.C. Title 49), Section 15a(2) 7, 48

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION and HUDSON & MANHATTAN RAILROAD COMPANY,

Appellants,

vs.

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,

Appellees.

Appeal from the District Court of the United States for the District of New Jersey

BRIEF FOR APPELLEE, CITY OF JERSEY CITY

Opinions Below.

The opinions of the Court were rendered January 14, 1944 (R. 194-205).

The two reports and orders of the Commission which the Court enjoined are those bearing date June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272).

There are also involved in these proceedings the reports of the Commission of July 11, 1938, 227 I. C. C. 741 (R. 286), August 3, 1943, 256 I. C. C. 269 (R. 313), and September 18, 1943 (R. 351).

Jurisdiction.

Appellants have enumerated the statutes under which it is alleged jurisdiction has been conferred upon this Court. True, this is an appeal from a decree and order of the statutory court enjoining an order of the Commission, but it is to be observed here that the injunction was necessary in order to permit the proceedings to be "remanded to the Interstate Commerce Commission for further hearing and reconsideration in accordance with the views expressed in the opinion of the court" (R. 220), and neither appellant has made any attempt to comply with this mandate but instead, has sought refuge by an appeal.

Statutes Involved.

Interstate Commerce Act (Sections 1 (1), 1 (5), 15a (1), 15a (2) and 15 (7), Title 49, Chapter 1, U.S.C.A.).

Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50 U.S.C. Secs. 901 et seq.).

Inflation Control Act (Stabilization Act) of 1942 (Act Oct. 2, 1942, Title 50, U.S.C. Secs. 961 et seq.).

Questions Presented.

The Commission, in an "Investigation and Suspension" proceeding instituted under Section 15 (7) of the Interstate Commerce Commission Act (U.S.C. Title 49) made various orders based on the revenue section of the act (U.S.C. Title 49, Sec. 15a (2)). In all of the proceedings herein referred to, the railroad sought to establish a ten cent fare on its downtown line. On July 11, 1938, the Commission permitted an increase from six cents to eight cents. On June 8,

1943, the Commission permitted an increase from eight cents to nine cents. Without any hearing, the Commission on August 3, 1943, modified the order of June 8, 1943, and permitted a further increase on the downtown line from nine cents to nine and one-eleventh cents, if tokens were purchased requiring an expenditure of $1 for eleven tokens, or ten cents in cash for passengers unwilling to make a purchase of tokens.

After litigation had been instituted by Jersey City charging a denial of a full and fair hearing, the Interstate Commerce Commission reopened the proceedings by its order of September 18, 1943[1]. The "investigation and suspension" proceedings having been reopened, and having in mind the fact that all of the fare orders involved were based upon the revenue section of the act, Jersey City offered testimony dealing directly with revenue, income and expenses of the railroad and also offered to prove that the traffic of the railroad had increased by 30 per cent over 1941, which latter fact the Commission stated in its report of June 8, 1943, would result in the railroad meeting its interest requirements on its bonded indebtedness. Such testimony, however, was not admitted in evidence by the examiner. His ruling was sustained by the Commission despite the direct statement in the order of June 8, 1943, that any party is at liberty to bring to the attention of the Commission facts with respect to any changed condition (R. 271). The examiner refused this testimony on the ground that it was not within the scope of the order of September 18, 1943, reopening the proceedings. The Commission not only concurred in this refusal but prejudged the evidence and stated in its order of November

[1] Order of September 18, 1943, is entitled "Investigation and Suspension Docket No. 4394", (R. 351).

2, 1943, permitting the increase to stand, that "considering the contents of the motion now before us and the offer of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held we would feel warranted in modifying our findings as made in the second (November 2, 1943) report" (R. 275).

This presents the question whether the Commission having opened the "investigation and suspension" proceedings for further hearing was justified in refusing to accept relevant testimony and pre-judge such testimony without knowing its full import and affect and making an order for an increased fare without any findings or evidence that such increase is necessary to render adequate and efficient railroad transportation service at the lowest cost consistent with the furnishing of such service, and as to the need of revenue sufficient to enable the carrier under honest, economical and efficient management to provide such service.

Facts.

(A) History of proposed ten cent local interstate fare culminating in order of June 11, 1938 (R. 286).

Prior to April, 1920, the fares of the Hudson & Manhattan Railroad Company for local interstate transportation between Jersey City and New York were five cents on the local downtown line and seven cents on the local uptown line. In April, 1920, the railroad proposed to establish a flat fare of eight cents between its Jersey City and Hoboken stations on the one hand, and all stations in New York City on the other. The Interstate Commerce Commission frowned upon a flat fare of eight cents because

such fare "does not coincide with the respective mileage traversed by the passenger through the tubes to uptown stations and to the downtown terminal." The Commission thereupon suggested a six cent fare downtown and a ten cent fare uptown, which fares were finally adopted and approved after formal hearings. *Local Fares of Hudson & Manhattan Railroad Company,* 58 I.C.C. 270. The six cent and ten cent fares so approved by the Interstate Commerce Commission in April, 1920, continued in effect without change down to July 31, 1937.

By schedule designated as Hudson and Manhattan Railroad I.C.C. 42, filed with the Interstate Commerce Commission on July 31, 1937, to become effective September 1, 1937, the railroad sought to effectuate a fare of ten cents for the interstate transportation of passengers on both the railroad's downtown and uptown line, in lieu of the then existing interstate fares of six cents on the downtown line and ten cents on the uptown line.

As a result of protests filed by numerous commuters and the municipalities of Jersey City, Hoboken, Bayonne, Harrison, Secaucus, North Bergen, and others, pursuant to the provisions of Section 15(7) of the Interstate Commerce Act (U. S. C. Title 49, Section 15(7)), directly bringing into issue the legality of the proposed fares under Sections 1 and 3 of the Interstate Commerce Act, the proposed schedules were suspended and the subject matter thereof set for formal hearing before the Interstate Commerce Commission in a proceeding entitled *Investigation & Suspension Docket No. 4394, Passenger Fares, Hudson & Manhattan Railroad.*

After a full and complete hearing the Interstate Commerce Commission, on July 11, 1938, issued its report and order, 227 I.C.C. 741, finding that the proposed increase in

the local downtown fare from six to ten cents had not been justified but that a fare of eight cents would be proper. In holding that the fare of ten cents, for application to the local downtown passenger, had not been justified, the Commission, in its report and order 227 I.C.C. 741, made the following findings:

1. "The proposed fare of ten cents would be unreasonable under sections 1 and 15a of the Act and has not been justified." 227 I.C.C. 741, 762. (R. 311.)
2. "From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem that if ten cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than ten cents." 227 I.C.C. 741, 754. (R. 302.)
3. "If respondent should feel impelled to seek a further increase in revenue, it should consider doing so on interline traffic." 227 I.C.C. 741, 762. (R. 311.)

As is thus apparent, for the second successive time, the Commission condemned as unreasonable the maintenance of the same fare on the downtown line as concurrently existed for application on the uptown line because of the tremendous disparity in the respective uptown and downtown services rendered.

Following the promulgation of the report and order of the Interstate Commerce Commission as aforesaid, 227 I.C.C. 741, the railroad, on July 25, 1938, effectuated the prescribed eight cent fare on the downtown line which has since been maintained concurrently with the ten cent fare on the uptown line. Following this report and order of the

---

Interline traffic refers to passengers traveling over the joint facilities of the Hudson & Manhattan Railroad and Pennsylvania Railroad.

Interstate Commerce Commission, the railroad appealed to the courts to enjoin the effect thereof, It filed a complaint in the Southern District of New York which was dismissed because of improper venue, *Hudson & M. R. Co.* v. *U. S.* 28 Fed. Supp 137. Thereupon the railroad filed its complaint in the United States District Court for the District of New Jersey and after hearing, the complaint was dismissed, the court upholding the order of the Commission. *Hudson & M. R. Co.* v. *United States*, 33 Fed. Supp. 495. The railroad's appeal to this Court resulted in an affirmation both of the District Court's findings and the report and order of the Interstate Commerce Commission, *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98.

Section 1(5)(a) of the Interstate Commerce Act (U.S.C. Title 49, Section 1(5)(a)) provides that all charges for service must be just and reasonable, and every unjust and unreasonable charge is unlawful.

Section 3 of the Interstate Commerce Act (U.S.C. Title 49, Section 3) declares unlawful any action by a common carrier which in effect makes, gives or causes any undue or unreasonable preference or advantage to any particular person or description of traffic or to subject any particular person or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Because the burden of proof devolved upon the railroad to justify the proposed increased fare (U.S.C. Title 49 Sec. 15(7)) and realizing that the proposed ten cent fare could not be justified under Sections 1 or 3 of the Act as aforesaid, the railroad sought refuge under the provisions of Section 15a(2) of the Act. That section (U.S.C. Title 49, Sec. 15a(2)) provides as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates

on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

Recognizing the requirements of Section 15a(2) of the Act, the Commission narrowed the issues involved, and in its report of July 11, 1938, clearly indicated that it based its determination upon the revenue requirements of the act. It stated:

> "Admitting the need for increased revenue two questions present themselves: First, is the proposed increased fare reasonable from the standpoint of the value of the service to the public; and second, would it produce the needed additional revenue or would some other fare be more likely to produce the desired result? In determining the latter question, consideration may be and should be given to whether any railroad service of respondent, other than the local downtown service, can be made to, and should be expected to, contribute some or all of the additional revenue needed." (R. 301.)

The narrowing of the issues was consonant with the established rules that in according relief under Section 15a(2) two primary findings of fact must be made by the Commission. The first is a determination of the carrier's needs for additional revenue; the second, if it is found that the carrier needs additional revenue, the Commission must find the specific amount thereof required and the method of allocation of the deficit. In other words the Commission must determine what portion of the deficit found to exist should be borne by the portion of the road under consideration. The Commission in its said report and order of July

11, 1938, made such a specific finding of revenue needs and determined that the maximum amount thereof that could properly be charged to the local downtown line was two cents and it accordingly authorized an increase in the then applicable local downtown interstate fare of six cents to the present level of eight cents. The Commission further found that the remaining specified revenue deficit should be and must be allocated against the interline traffic (traffic moving jointly over the facilities of the Pennsylvania Railroad and the Hudson & Mathattan Railroad).

The findings of the Interstate Commerce Commission of June 11, 1938, 227 I.C.C. 741, referred to above, fully complied with the statutory requirements of a revenue proceeding. Accordingly when that decision condemned the proposed ten cent fare it obtained affirmation by the District Court as well as the United States Supreme Court, *Hudson & Manhattan R. Co.* v. *U. S., supra.*

(B) The order of June 8, 1943 (R. 248) and events leading up to the hearing of September 28, 1943.

On July 27, 1942, the railroad filed a petition with the Interstate Commerce Commission requesting further hearing relative to its proposed fare increase. It sought permission to depict alleged changed conditions, and as a result thereof to publish and charge a ten cent fare on its downtown interstate local line. Further hearings were held and as a result thereof the Interstate Commerce Commission issued its decision of June 8, 1943, 255 I.C.C. 649, wherein it affirmed its original conclusion that the proposed fare of ten cents was unjust and unreasonable and had not been justified. (R. 271.) Because of factors then existing, principally precipitated by abnormal war time conditions,

the Commission concluded that an increased local downtown fare of nine cents was justified for application during the remaining period of the war and six months after the termination thereof. In its determination as aforesaid the Commission made the following specific findings:

(1) "That under normal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached." (R. 270.)

(2) "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision." (R. 270.)

(3) "While there can be little doubt that under present conditions a further increase in this (8-cent) fare, even to 10 cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic." (R. 270.)

(4) "Moreover, while the fares and charges for commutation service of carriers serving the New York metropolitan area are not uniform, those of carriers other than respondent portrayed on this record afford stronger support, differences in transportation services considered, for either an 8-cent or a 9-cent fare than for a 10-cent fare on the downtown line of respondent." (R. 270.)

On July 8, 1943, the railroad filed a petition seeking reconsideration and modification of the findings of the Commission in its report dated June 8, 1943. That petition,

through the medium of an affidavit attached thereto and made a part thereof (R. 327), sought to secure modification of that portion of the Commission's order which authorized the collection of a nine cent local downtown fare because of an alleged disability on the part of the railroad to collect such fare with available fare collection devices. By means of this petition the railroad sought, pending the procurement of tokens which were to be sold eleven for one dollar with an alternative cash fare of one dime, authorization to charge a cash fare of ten cents on the downtown line the same as that in effect on the uptown line. Such cash fare of ten cents was to continue in effect indefinitely until the railroad obtained the necessary tokens and made suitable arrangements for their use. As a corollary proposition the railroad proposed that if its request were granted it would reduce the uptown line fare from ten cents per passenger to eleven tokens for one dollar with an alternative cash fare payable only by a dime. In other words, it proposed once more uniform uptown and downtown fares.

The City of Jersey City and the Office of Price Administration seasonably answered the railroad's petition and, in requesting denial thereof, prayed that before any affirmative action be taken that the proceeding be set for further hearing to give all parties their requisite day in court on the new matters therein alleged and that the parties be granted their full right of cross examination. (R. 345, 352.) On August 3, 1943, upon the facts as aforesaid, without further hearing or other action, the Commission issued its report and order on reconsideration. Such report affirmed their prior conclusion that the proposed fare of ten cents had not been justified for general application on the downtown line but nevertheless permitted the increased local fare on the downtown line prayed for by the railroad, namely an alternative

fare of eleven tokens for one dollar or a cash fare of ten cents. Such permissive increase was expressly coupled with the proviso that concurrently with the establishment and maintenance thereof, the same alternative basis, namely, eleven tokens for one dollar or a cash fare of ten cents payable by a dime, be established and maintained for application on the interstate uptown local line. This finding was made despite the fact that the fare on the interstate uptown line was never brought into issue.

The Commission's order of August 3, 1943, which authorized the effectiveness of the alternative fare basis, as aforesaid, contained the following statement:

> "The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate." (R. 325.)

The original report and order of the Commission made on July 11, 1938, 227 I.C.C. 741, contained the statement that if the railroad "should feel impelled to seek a further increase in revenue (over and above the eight cent downtown fare therein prescribed) it should consider doing so on interline traffic." (R. 311). The Commission's decision containing such directive was upheld by the District Court for the District of New Jersey, *Hudson & M. R. Co.* v. *United*

States, supra, and affirmed by the Supreme Court of United States, *Hudson & Manhattan R. Co.* v. *United States, supra.* A similar directive by the Commission to the railroad to increase its revenue through adjustments in its interline divisions with the Pennsylvania Railroad appeared in the Commission's orders of June 8, 1943, 255 I.C.C. 649 (R. 270), and August 3, 1943 (R. 325). No affirmative action was taken by the railroad to comply with the Commission's directives.

On September 13, 1943, the City of Jersey City filed a complaint in the United States District Court for the District of New Jersey seeking to have enjoined the report and order of the Interstate Commerce Commission dated August 3, 1943. An application was contemporaneously made for a temporary restraint against the effectiveness of the Commission's order of August 3, 1943, and a statutory court was duly convened to hear said application.

Prior to any hearing, and before the statutory court convened as aforesaid, the Interstate Commerce Commission on its own motion, by order dated September 18, 1943, reopened the proceedings for further hearing "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943," and to afford "any party hereto . . . the right to cross examine adverse witnesses." (R. 351.)

(C) The hearing of September 28, 1943, and report of November 2, 1943.

Pursuant to the order of the Commission dated September 18, 1943, as aforesaid, the Commission's report and order of August 3, 1943 was reopened and the proceeding was

assigned for further hearing on September 28, 1943. The further hearing was restricted and limited by the terms of the Commission's order of September 18, 1943, as above quoted and as reiterated by the presiding examiner at the opening of the hearing. The appellees, City of Jersey City and the Office of Price Administration, objected to the limitations and insisted, from the very start of the hearing and repeatedly throughout the proceeding, that the announced scope of the hearing be enlarged to embrace all of the issues that necessarily required consideration before issuance of a revenue finding. It was requested that the issues be enlarged to permit the inclusion of evidence relating to the railroad's revenues, expenses and earnings as well as traffic patronage and classes thereof, since the close of the previous hearings. Objection was raised and exception taken to the trial examiner's refusal to receive any testimony with respect to the railroad's revenue except testimony confined strictly to the difference in revenue resulting from the nine cent authorized cash fare and the alternative token and ten cent cash fare basis.

It was the position of the City of Jersey City that the reopened hearing of September 28, 1943, continued to be an integral part of the revenue proceeding initially precipitated by the original filing of the proposed increased ten cent fare on July 31, 1937, and therefore the duty continued to devolve upon the railroad to justify the increased fare.

The railroad made no effort to prove that the proposed increased fare complied with Sections 1 and 3 of the Interstate Commerce Act. Instead it continued to seek protection under Section 15a(2). Thereupon, the City of Jersey City contended that, inasmuch as under the hearing order, the Commission still sought justification for the increased fares proposed, such justification could be found only under

Sections 1 or 15a(2) of the Act. The carrier, however, offered no proof under Section 1. Section 15a~~(2)~~ was thus the only remaining section applicable. It was thus incumbent that the Commission make revenue findings, the first that the carrier needed additional revenue, second, the amount of such additional revenue and third the proper and judicious manner of allocating it. In order to make such revenue findings, revenue testimony and evidence were essential. The City of Jersey City and the Office of Price Administration sought to introduce all of such testimony and evidence that was within their possession and knowledge and urged the railroad to submit such evidence and testimony perculiarly within its own knowledge. That evidence and testimony, it was contended was properly within the scope of the further hearing. The City of Jersey City and the Office of Price Administration, however, were denied the right to introduce any and all of such pertinent testimony and evidence, which if received would have established that the then present revenues of the railroad were sufficient in and of themselves to care for all current monetary requirements, including full interest on the bonded indebtedness. Therefore from a revenue standpoint the existing local downtown fare of eight cents was sufficient *per se*.

The revenue position of the railroad is advanced as justification for the alleged need of an increased downtown fare in the Commission's decision of June 8, 1943, 255 I.C.C. 649, as follows:

> "Under present fares (eight cents on the local downtown interstate line and ten cents on the local uptown interstate line) it would be necessary for its annual traffic to increase by about 30 percent over that of ~~respect thereto to our attention at a further hearing."~~ ~~(R. 271.)~~

1941 in order to meet the correct interest requirements in its bonded indebtedness (R 255)

The City of Jersey City sought, at the hearing of September 28, 1943, to introduce by exhibits and oral testimony proof that for the first six months of 1943, using actual patronage figures, the railroad enjoyed an increase of thirty percent over the corresponding period of 1941. Therefore, predicated upon the railroad's own estimates and the Commission's findings, as above quoted, (in 1943 actual patronage exceeded that of 1941 by thirty percent) it needed and needs no other or additional monies over that produced by the current downtown fare of eight cents to meet the interest on its bonded indebtedness. Accordingly, it was contended that revenue needs cannot be used as justification for the prescription of any local downtown fare in excess of eight cents. (Exhibit P-1, pages 2149, 2150.)

At the same hearing there was sought to be introduced into evidence a "condensed income statement" of the railroad covering the months of July, 1942, and July, 1943, and the first seven months of 1942 and 1943 respectively. This exhibit, like the exhibit of patronage above referred to, was excluded from the record. The condensed income statement showing the repeatedly improving financial position of the railroad, even considering all its alleged operating expenses, was offered to establish that at the existing eight cent fare the railroad was earning more than the Commission anticipated it would earn at the nine cent fare in its order of June 8, 1943, 255 I.C.C. 649.

It was and is the contention of the railroad that the increased revenue herein sought is due largely to increased operating expenses precipitated by war time conditions. It was and is the position of the City of Jersey City and the Office of Price Administration that by far the largest increase in the railroad's patronage was and is in its interline traffic and that such interline traffic should bear its fair share of the increased operating expenses. While the railroad

agreed to submit traffic studies setting forth a comparison of its present and past local patronage it refused to include therein facts relative to its interline patronage. The City of Jersey City and the Office of Price Administration were precluded from adducing information with respect to the interline traffic. This information obviously had and has a direct bearing upon the Commission's directive to the railroad to seek additional revenue by increased divisions from the Pennsylvania Railroad in its interline arrangements. If such probative and material testimony had been received it would have established that the railroad was derelict in its obligations of conserving its sources of revenue because it failed to make the joint interline contribute reasonably to the railroad's earnings commensurate with the services the railroad contributed to the joint service.

The railroad claimed that it was and is incurring an alleged expense of Twenty Thousand Dollars ($20,000) a month for war insurance which the Office of Price Administration contends was and is excessive and unreasonable. Testimony and evidence were precluded which would have established not only the excessive nature thereof but the additional fact that if the excess amount of such insurance cost were eliminated, the railroad would earn, at the existing eight cent fare, far in excess of all interest charges. Such current earnings were not anticipated by the Commission when it prescribed the nine cent fare in its order of June 8, 1943, 255 I.C.C. 649.

The order of the Interstate Commerce Commission of June 8, 1943, 255 I.C.C. 649, contained the statement:

> "It should be understood that if at any time prior to the expiration of that period (the duration of the war and six months thereafter) by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those

estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing." (R. 271.)

Notwithstanding the above statement contained in the report and order of June 8, 1943, *supra*, the trial examiner precluded and prevented the City of Jersey City and the Office of Price Administration from bringing to the attention of the Commission the changed and different facts and conditions. It was also alleged, although the parties were precluded from introducing proof because of the circumscription of the issues involved at the rehearing, that the nine cent local downtown interstate fare, authorized by the Commission's decision of June 8, 1943, *supra*, was productive of revenues over and above those to which the carrier was legally entitled or actually required, that *ipso facto*, the proposed alternative basis sought to be established by the railroad and approved by the Commission in the report and order of November 2, 1943, *supra*, also produced excessive revenues substantially over and above those required by the railroad.

On October 14, 1943, the Office of Price Administration, pursuant to the suggestion of the trial examiner who presided at the hearing of September 28, 1943, filed with the Interstate Commerce Commission a written motion for modification and amendment of the order of September 18, 1943, limiting and confining the issues of the further hearing to be effectuated by a further unlimited hearing. In that motion the City of Jersey City joined by letter. (R. 389.) The motion requested the reopening of the proceeding to permit the City of Jersey City and the Office of Price Administration to introduce the evidence excluded by the examiner and such other and additional evidence as might be necessary to bring the record, now alleged to be obsolete

and stale, down to date. That motion was overruled by the Commission in its "Second report on further hearing," issued November 2, 1943 (R. 275), wherein the Commission in addition to overruling the aforesaid motion granted the railroad's petition to substitute token and cash fares, the token fares to be sold at eleven for one dollar and the alternative cash fare to be paid only by a dime.

In treating with the offer of the City of Jersey City and the Office of Price Administration to submit evidence concerning the revenue situation of the railroad, mandatorily vital in a Section 15a(2) proceeding, the Commission said, in its report and order of November 2, 1943:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearings sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear the alternative fare basis herein approved cannot be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled." (R. 275.)

In other words the Commission not only prejudged what its attitude would be after the receipt of the testimony sought to be introduced but felt justified in estimating the revenue yield without the benefit of the underlying information without which any revenue estimate is improper.

The order of the Commission of November 2, 1943, notwithstanding the controversial character of the proceeding, permitted the railroad to depart from the usual statutory rule (U.S.C., Title 49, Sec. 6(3)), which requires effectuation of rate changes on thirty days notice after filing with the

Commission and in lieu thereof permitted the railroad to file and make effective the new tariff providing for the alternative fare basis on fifteen days notice.

Summary of Argument.

1. The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission.

(A) They were denied the right to introduce testimony and evidence under Section 15a (2) which must form the basis for any revenue award under that section;

(B) They were denied the right to introduce testimony and evidence which the Commission in its report and order of June 8, 1943, invited them to do and which went directly to the basis of that order.

2. By its hearing order of September 18, 1943, reopening the proceedings for further hearing on September 28, 1943, the Interstate Commerce Commission actually reopened the revenue phase of the proceeding.

3. The Commission's order of November 2, 1943, makes findings of fact allegedly predicated upon the evidence of record, but neither the findings of fact nor the evidence of record are within the confines of the Commission's legal authority under 15a (2).

4. Before appellant railroad is entitled to any increased fares under the revenue section of the act it must, among other factors, affirmatively establish its need of revenues sufficient to enable it under honest, economical and efficient management to provide adequate service at the lowest cost consistent with such service.

5. The imposition of a cash fare of ten cents for the

downtown local service is unreasonable, and unduly discriminatory and in violation of the Interstate Commerce Act.

6. The appellees exhausted all administrative remedies before instituting proceedings in the District Court.

7. Jersey City was not estopped from either asking the Commission to receive the tendered evidence or from seeking an injunction based on the Commission's refusal to receive such evidence, nor is it estopped from seeking an injunction against the order of the Commission of June 8, 1943.

Argument.

1.

The City of Jersey City and the Office of Price Administration were deprived of a full and fair hearing.

It is clear that the Interstate Commerce Commission having been created by an act of Congress for the purpose of promoting and facilitating commerce has only such powers and rights as were specifically delegated to it by Congress in enabling legislation, the Interstate Commerce Act. It is chargeable with the specific duties and requirements set forth in the said Act. The Commission can only act pursuant to the statute. To the extent that it seeks to perform acts not specifically authorized by the Interstate Commerce Act or to the extent that it actually acts in contravention of the specific requirements of the Interstate Commerce Act, its action becomes a nullity.

Texas, Etc. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 197;
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 73 F. 409.

The Interstate Commerce Act, Section 15(1) (U. S. C. Title 49, Sec. 15(1)) requires that all orders of the Interstate Commerce Commission resulting from a proceeding comparable with proceedings *sub judice*, shall be the result of a "full hearing." In *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 Sup. Ct. Rep. 185 at page 93, this Court said:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Int. Com. Comm. v. Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. United States v. Baltimore & Ohio S. W. R. R., 286 U. S. 14."

The notice of further hearing herein dated September 18, 1943 (R. 351), which resulted in the hearing of Septem-

ber 28, 1943, limited and restricted the issues to the precise pattern of facts raised by the railroad's petition of July 8, 1943. It is most unusual for a reopened proceeding before the Interstate Commerce Commission to be confined and limited to the precise scope of issues raised by one party to the litigation. *Sinclair Crude Oil Purchasing Co.* v. *Atchison T & S F Ry. Co.*, 168 I.C.C. 449, The limitations upon the admissible testimony clearly portray a predetermined intent to preclude evidence dealing with the need for carrier revenue or the amount or allocation thereof. The reopened proceeding of September 28, 1943, as limited, was not concerned with the legal necessity of determining whether it was appropriate to increase fares under Section 15a(2) of the Interstate Commerce Act nor whether any other section of the act would countenance or justify the prescription of increased fares in the light of existing facts. The allegations and contentions of the City of Jersey City and the Office of Price Administration, that the record in the proceeding was stale because of changed conditions affecting the carrier's revenue were relegated to a position of immateriality or non-existence under the limited issues guiding the further hearing. The preclusion of the receipt of probative revenue testimony and evidence was in complete variance with the principle enunicated in *Atchison, Topeka and Santa Fe Railway Co.* v. *United States*, 284 U. S. 248, and the language of Mr. Chief Justice Hughes, at page 262 thereof is appropriate here:

> "We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

In the last cited case this Court in speaking of the functions of the Interstate Commerce Commission also stated, at page 262:

> "In the discharge of its duty a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. In the instant proceeding the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions was denied."

The appellant, Interstate Commerce Commission, in its brief refers to *United States* v. *Northern Pacific Ry. Co.* 288 U. S. 490, as justification for the contention that appellees had a full and fair hearing. In the case cited the court dismissed the proceeding because the parties "sat silent and took the chance of a favorable decision on the record as made." We did not sit silent. We endeavored to submit the testimony at the reopened hearing. We were precluded from doing so. In the *United States* v. *Northern Pacific Ry., supra,* the parties chose not to submit the evidence. They were at liberty to do so. We sought to submit it. We were prevented from submitting it.

The case at bar is also entirely distinguished from *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, referred to on page 40 of the brief for appellant, Interstate Commerce Commission. There the question involved the refusal to reopen a hearing in a case where no change of condition was even alleged. In this case the principal complaint of the appellees before the District Court was not that the Commission refused to reopen the proceeding but that the Commission did reopen the proceeding and that at such reopened proceeding it refused to accept testimony and evidence directly in issue, of a material, probative and vital character. If it can be said that the court's action in *Atchison, T. & S. F. Ry.* v. *United States, supra,* was taken because "The *Atchison* case rests upon its exceptional

facts", then obviously this case rests upon facts even more exceptional, more drastic than those in the *Atchison* case. The issue herein is not whether this Court should interfere "with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing," the issue involved in *Baltimore & Ohio R. Co.* v. *United States, supra,* but whether this Court shall interfere with the Commission's action in refusing to grant all parties to the proceeding equal opportunity of presenting testimony and evidence relating to the matter in issue.

A full hearing has been defined by this Court in the *New England Division Case,* 261 U. S. 184, at page 200, as follows:

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

As we shall herein establish, the testimony and evidence, which the City of Jersey City and the Office of Price Administration sought to adduce, possessed highly probative value and as a matter of fact was of such nature that in the absence thereof the record is barren of facts sufficient to justify any revenue finding. Hence, appellees were deprived of their clear right to a full and fair hearing.

(A) The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission because they were denied the right to introduce testimony and evidence under Section 15a (2) which must form the basis for any revenue award under that section.

At the very outset it should be made apparent that appellees' principal claim that they were deprived of a full and

fair hearing was predicated on their inability, because of the examiner's rulings during the September 28, 1943, hearings, to introduce material, pertinent and probative matter clearly within the scope of the reopened hearing.

The reopened hearing of September 28, 1943, was for the purpose of establishing a record to justify or preclude a modification of a previously prescribed fare. Although the hearing notice indicated that the hearing would be held to secure justification for an upward modification, it must also be held that its purpose was to secure the basic and true facts upon which a determination could be predicated. To hold that the hearing was to be one sided only, i.e., merely to receive the railroad's testimony as to the need for the increased fare while denying the appellees the right to introduce rebuttal testimony or evidence showing the lack of need for an increased fare, would in and of itself constitute arbitrary action and lead to the conclusion that appellees were denied a full and fair hearing.

Appellees participated in the September 28, 1943 hearings, on the premise that the proceedings were reopened with respect to the issue of whether the previously authorized fare should be increased as proposed or if not, what fare should be substituted therefor. That was a fair interpretation of the hearing notice of September 18, 1943. The preclusion of testimony and evidence, hereinafter shown to be vital, even under the hearing order of September 18, 1943, was a clear indication that the sole purpose of the hearing of September 28, 1943, was to pretend to satisfy appellee's objections that they were being deprived of their day in court. A pre-trial determination that only evidence justifying an increased fare shall be received, obviously does not precipitate a full and fair hearing which ostensibly is called to impartially determine the merits of

the cause of action. To that extent, therefore, the appellees were deprived of their full day in court and a full and fair hearing.

It is agreed that this proceeding is wholly in the nature of a revenue proceeding and accordingly governed entirely by the requirements of Section 15a (2) of the Interstate Commerce Act which provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

In *Industrial Railways Case*, 29 I.C.C. 212, the Interstate Commerce Commission in enunciating the doctrine of law applicable to a revenue proceeding said:

> "No substantial part of the well informed public would deny to owners of railroads a reasonable return on their investments but before they may fairly ask the general public to share further in carrying their burdens the railroads must properly conserve their sources of revenue by making every service rendered contribute reasonably to their earnings. This having been done, the Commission upon adequate showing of the need of additional revenues will sanction measures required to bring reasonable prosperity so far as may be accomplished under rates and charges reasonably just alike to shippers and carriers."

In the Commission's report and order of July 11, 1938, 227 I.C.C. 741 which was reviewed by the courts the Com-

mission fully complied with the statutory requirements. It made a specific finding of the revenue needs of the carrier, after complete analysis of the income and expenses. Thereupon it determined that a deficit existed and specifically set about to allocate such deficit. The record contained the underlying data which were and are required for making such necessary findings. The Commission specifically found therein that the eight cent downtown fare would produce $2,260,817 (R. 311) or approximately $541,000 less than the railroad needed (R. 292). Then the Commission stated that the railroad, if it desired additional revenue, obviously referring to the $541,000, should consider obtaining it from the interline traffic (R. 311). This directive to obtain the deficit from the interline traffic was obviously predicated upon the interline traffic then existing.

The question of the allocation of any existing deficit was and still is a vital function of the Interstate Commerce Commission in a revenue proceeding. Nevertheless the Commission refused to accept any testimony or evidence relative to the current interline patronage of the railroad; this despite the fact that the appellee, City of Jersey City, was ready, willing and able, at the September 28, 1943, hearings, to submit such evidence. Without it the Commission was powerless to make an allocation of revenue deficit.

It is contended that at the oral argument, preceding the decision of June 8, 1943, certain traffic and revenue statistics were stipulated into the record. These traffic statistics, consisted wholly and solely of (1) the aggregate number of passengers using the Hudson & Manhattan Railroad's facilities during the months of January and February, 1943, and (2) the gross revenue accruing therefrom to the Hudson & Manhattan Railroad. No statistics, of any nature, exists in this record relative to the expenses of the Hudson

& Manhattan Railroad or the number of interline passengers using the Hudson & Manhattan facilities during 1943, or any month thereof. There is nothing in this record that would enable the Commission to make a finding as to the proportionate liability of the interline traffic for any deficit that might exist. This is so even though the Commission stated in its report and order of June 8, 1943, 255 I.C.C. 649:

1. "That under n rmal circumstances the saturation point in increased fares (referring to the eight-cent fare) on that traffic (downtown) has about been reached" (R. 270).

2. "While there can be little doubt that under present conditions a further increase in this (eight-cent) fare, even to 10 cents, would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic" (R. 270).

The Commission specifically found that the record in these proceedings did not justify requiring the downtown local passengers to bear the entire burden of increased operating costs. Nevertheless, while stating that the interline traffic should bear its proportionate share thereof the Commission refused to permit any evidence into the record which would enable it to make a determination of the amount of the share that the interline traffic properly should bear. Had the City of Jersey City not been precluded from submitting testimony on this point, it would have established that the interline traffic for the first six months of 1943 reflected an increase over 1941 of 58.8 per cent. Because of the limitation imposed upon Jersey City,

it was never able to submit such factual matter to the Commission which accordingly never had the benefit thereof.

To support a finding that increased revenue may accrue to a railroad under Section 15a(2), the Act specifically requires that a correlated finding be made that the railroad is efficiently and economically managed. Not only is there no evidence in this record to support such finding but the record precludes the propriety of a finding that the carrier is efficiently and economically managed. Although the appellees specifically requested the Commission to make a finding, in accordance with the statute, that the railroad was and is not efficiently and economically managed, the Commission made no finding with respect to this essential point.

Since July 11, 1938, the Commission has directed the carrier's attention to the propriety of securing increased revenue from interline traffic. If the railroad was unable to effectuate such increase in its divisions of the joint line traffic through voluntary measures, ample relief was and is provided under Section 15(3) of the Interstate Commerce Act (U. S. C., Title 49, Sec. 15(3)), which provides that the Commission may establish joint fares and "the division of such fares or charges as hereinafter provided and the terms and conditions under which such through routes shall be operated."

Effective February 10, 1942, as a result of the authorization of the Interstate Commerce Commission to railroads generally in *Increased Railway Rates, Fares, and Charges*,

1942, 248 I.C.C. 545[1], the interline passenger fares of the Pennsylvania Railroad and Hudson & Manhattan Railroad (between Newark, N. J., and New York) were increased by ten per cent. It is estimated (because the appellee, City of Jersey City, was precluded from adducing the actual facts relative hereto at the hearing of September 28, 1943), that the minimum amount of this increase, is $511,600. Although the Hudson & Manhattan Railroad is entitled to its share of the joint line revenue, every cent of the increase has been retained by the Pennsylvania Railroad. The Hudson & Manhattan Railroad has not shared therein to the extent of a single penny, wholly because of its own dereliction. The record clearly belies any finding other than that the carrier is not efficiently and economically managed and therefore relief under Section 15a(2) cannot be accorded. Evidence with respect hereto is material and pertinent in this hearing. Without it the Commission was unable to make a proper revenue determination.

It is evident that if the Commission were to make appropriate findings, under Section 15a(2) of the Act it was necessary first to determine whether the carrier needed revenue. The Commission was unable to make such determination as the result of the September 28, 1943, hearing because no evidence was admitted relating to that fact. Appellees claimed and offered to prove that no additional

[1] This proceeding, commonly referred to as Ex Parte 148, was the result of an application by railroads generally for a rate and fare increase necessitated by labor increases and abnormal wartime operating costs. The Interstate Commerce Commission permitted increases in freight rates in an amount of 6% and in passenger fares in an amount of 10%.

Because of the upsurge in railroad revenue, resulting from increased traffic, the Interstate Commerce Commission revoked the authority (see infra under Point 7) previously granted for increased rates and fares and accordingly the 6% increase on freight rates, and the 10% increase on passenger fares insofar as they pertained to commutation fares, were cancelled.

revenue was needed. Appellant made no effort to sustain the burden of proof upon it by showing a current need for additional monies. There is nothing in the September 28, 1943, record which would permit the Commission to make a necessary revenue finding. The Commission is unable to make a finding allocating any revenue deficit, assuming that one existed because of this lack of data in the record necessary to establish the true facts relative to the various services of the railroad.

"A finding without evidence is beyond the power of the Commission." *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92. To determine whether the Commission acted within its powers the courts will determine whether there was substantial evidence to sustain the Commission's order. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541. The decision of the Commission cannot be sustained by the courts where the only reasonable deduction from the entire record is that the Commission has undertaken to support its findings (a) by arbitrarily permitting only selected evidence to be introduced into the record, which selected evidence was so selected because it and it alone would support the Commission's findings, and (b) by arbitrarily and completely rejecting and refusing to admit or consider all other evidence, solely because it conflicts with the Commission's findings.

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91;
The Chicago Junction Case, 264 U. S. 258, 265;
Consolidated Edison Company, et al. v. *National Labor Relations Board*, 305 U. S. 197, 229;

National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299; *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F (2d) 13, 15 (C.C.A. 6th, 1938).

While a court may not weigh the evidence before the Commission or substitute its judgment for that of the Commission as to the conclusions to be drawn from that evidence, a court may set aside an order of the Commission where, as here, it appears that, in making that order and the findings upon which it is based, the Commission itself neither weighed the evidence nor exercised any judgment based on the evidence, but made its findings in arbitrary and complete disregard of the evidence.

Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452, 470;
Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91.

(B) The appellees were deprived of a full and fair hearing before the Interstate Commerce Commission because they were denied the right to introduce testimony and evidence which the Commission in its report and order of June 8, 1943, invited them to do and which went directly to the basis of that order.

In the report and order of the Interstate Commerce Commission dated June 8, 1943, it is stated:

"Based on the foregoing facts and estimates, respondent points out that under present fares it would be necessary for its annual traffic to increase by about 30 percent over that of 1941 in order to meet the current

interest requirements on its bonded indebtedness." (R. 255.)

Had plaintiff and intervenor not been precluded at the hearing commencing September 28, 1943, which resulted in the report and order of November 2, 1943, they would have established, as indicated by their offer of proof, that for the first six months of 1943, actual patronage figures show an increase over the corresponding period of 1941 of 30 percent. Therefore, predicated upon the railroad's own estimates (the 1943 patronage exceeds 1941 by 30 percent), it needs no other or additional revenue over that produced by the current downtown fare of eight cents, to pay the interest on its bonded indebtedness. Such interest on its bonded indebtedness was the full amount the railroad sought to recoup by means of an increased fare. Its aspiration is now fulfilled under existing fares. Accordingly, revenue needs cannot be used as justification for the prescription of a local downtown fare in excess of eight cents. The refusal of the Commission to accept testimony and evidence offered by appellees which would have established the patronage increase aforesaid, in view of the particular findings in the order of June 8, 1943, as above quoted, was arbitrary and unwarranted. The prescription of any fare in excess of eight cents whether it be in the order of June 8, 1943, August 3, 1943, or November 2, 1943, is in complete disregard of the evidence.

In its report and order of November 2, 1943, the Interstate Commerce Commission said:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held we would feel warranted in modifying our findings as made in the second report." (R. 275.)

The statement as above, particularly insofar as it refers to the exclusion of probative revenue evidence, the only evidence upon which a Section 15a(2) finding can be predicated, reflects arbitrary action. The railroad admits that all it needed was a 30 percent increase in patronage. The Commission refused to accept evidence establishing satisfaction of that need.

In this proceeding the Commission was required to make findings of the revenue needs of the railroad. However, even before receiving revenue evidence, it prejudged the disposition thereof:

Notwithstanding the direct expression of the clear right of any party to bring to the attention of the Commission facts of any changed revenue condition, as contained in the order of June 8, 1943, and notwithstanding the fact that a further hearing was actually held on September 28, 1943, the Commission, nevertheless, arbitrarily and in complete disregard of its own directive, precluded the appellees from presenting any of the revenue testimony and evidence which the Commission stated, in its report and order of June 8, 1943, it would receive.

The appellants inaccurately state our contention as to the denial of a fair hearing. In their briefs they repeatedly assert that appellees complain because of the failure on the part of the Commission *to reopen the hearings* for the purpose of receiving the testimony they sought to introduce in evidence. We make no such contention. The basis for appellee's complaint is that the Commission having voluntarily on September 18, 1943, opened the proceedings to receive evidence bearing upon the modified order of August 3, 1943, accepted and heard the evidence of the railroad but refused to receive evidence from the appellees.

Although the hearing Order of September 18, 1943, stated that the proceeding was reopened to permit any

party hereto to present evidence directed solely to the propriety and lawfulness of the modification made by the Commission in its report of August 3, 1943 (R. 351), the modifications made by the Commission were wholly and solely to increase the amount of the authorized railroad local downtown fare and such authorization was presumably predicated upon revenue requirements. It was wholly and solely with respect to the revenue requirements of the railroad that appellees' evidence and testimony were directed. It was wholly and solely at such reopened hearing that appellees sought to introduce their evidence and testimony. They did not, as the appellant contends, seek a further or additional hearing, in the first instance, to submit such testimony and evidence. Hence appellants' briefs, to the extent that they indicate that the Commission had the right to determine when to terminate the proceedings and the right to deny further hearings has no bearing on the appellees' endeavor to submit probative evidence and testimony at the reopened hearing of September 28, 1943. The Commission precluded the appellees from offering their testimony, notwithstanding the fact that it had theretofore stated in its order of June 8, 1943, (R. 248) that "it should be understood that if at any time prior to the expiration of that period (the duration of the war and six months thereafter), by reason of changed conditions or otherwise, the revenue result to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is, of course, at liberty to seek to bring the facts with respect thereto to our attention at a further hearing."

2.

By its hearing order of September 18, 1943, reopening the proceeding for further hearing on September 28, 1943, the Interstate Commerce Commission actually reopened the revenue phase of the proceeding.

The hearing order of September 18, 1943, reads as follows (R. 351):

> "Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,
>
> *It is ordered*, That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission."

The language of that rehearing order is clear and unequivocal. It provided that any party might be permitted to present evidence *directed to the propriety and lawfulness of the modifications* made by the Commission in its report of August 3, 1943. What were the modifications referred to? Obviously they consisted of an increase in the local downtown fare from nine cents to the alternative basis of eleven tokens for a dollar or a cash fare of ten cents payable by a dime. In other words it is obvious that the proceeding was reopened to permit evidence di-

rected to the propriety (and under the terms of the bearing order obviously to the impropriety) of a revenue increase.

This proceeding was and is an "investigation and suspension proceeding" instituted under United States Code Title 49, Section 15(7) as its title indicates. When the proceedings were reopened the problem for determination was whether the precise fare set forth in the order of August 3, 1943, was a proper fare to be established. That was the purpose for the hearing. The Commission's own past action clearly indicates that in an "investigation and suspension" proceeding the evidence is directed toward the prescription and establishment of a proper fare. In the original proceeding herein, resulting in the report and order of the Commission July 11, 1938 (R. 286), the existing fare was six cents. The proposed increased fare was ten cents. Ostensibly, under the present theory of the appellant, Interstate Commerce Commission, the evidence at that time, should have been restricted and confined wholly toward the propriety or the impropriety of the proposed ten cent fare. But it was not. The Commission prescribed a fare, for the future, of eight cents, a clear indication that it accepted the evidence and construed it as being applicable to all of the possible fares within the range between the six cent existing fare and the ten cent proposed fare.

Again, in the subsequent hearings, resulting in the report and order of the Commission of June 8, 1943, 255 I.C.C. 649 (R. 249), the existing fare was eight cents. The carrier again proposed a ten cent fare. The purpose of the hearing ostensibly, in view of the carrier's petition for a ten cent fare was to determine the propriety of the proposed ten cent fare. Was the testimony and evidence restricted wholly and solely to a ten cent fare? Obviously it was not, because the Commission prescribed a fare of nine cents.

As a matter of fact in both of the proceedings, as above, testimony and evidence was offered and received depicting

the situation under fares below the level of the then existing, effective fares. In other words the purpose of the hearing was to determine, from the mass of evidence to be produced, what a reasonable fare, under the circumstances, should be. No attempt was made by the Commission to prejudge its action by limiting the evidence to a preconceived reasonable fare. The determination of the reasonable fare was to flow wholly and solely from the evidence.

When the Commission issued its hearing order of September 18, 1943, did it on that date, and for the sole purpose of that one proceeding revolutionize its entire concept, powers and rights in an investigation and suspension proceeding by necessarily confining all evidence and testimony to establishing the propriety of a certain preconceived fare? If it did that, it would according to its own past contentions, be stripping itself of the power and stripping the parties to the proceeding of the right to effectively administer the provisions of Section 15(7) of the Act (U.S.C., Title 49, Section 15(7)).

Hence, in accordance with the construction of its powers since the inception of these proceedings, and by the rules of contemporaneous construction as to the powers of the Commission and its rights under Section 15(7) proceeding, the order of September 18, 1943, reopened the proceeding for the purpose of determining a reasonable maximum fare in accordance with the standards of the Act. It was not and could not properly be confined to any one fare or charge.

Even assuming that the proceeding of September 28, 1943, was confined, by the hearing order of September 18, 1943, wholly and solely to evidence relative to the propriety of an increase in fares to an alternative basis on the local downtown line of eleven tokens for a dollar or a cash fare of ten cents payable only by a dime, the Commission was

bound to accept evidence that the carrier was procuring adequate revenues at the then current fare. The Commission was also required to receive evidence that any fare in excess of 9 cents was unreasonable. But instead, the only evidence the Commission received was that relating to the disability of the carrier. The reasonableness of the fare is in issue when the carrier seeks to increase it by any amount.

Does it not obviously follow that if the testimony and evidence establish that any fare in excess of eight cents is unreasonable that a fare of nine and one-eleventh cents or ten cents is surely unreasonable? Does it not follow that if a fare of eight cents produces adequate revenues to meet current obligations that a fare of nine and one-eleventh cents or ten cents produces more than sufficient revenues to meet current operating obligations?

If it is alleged that the carrier needs no additional revenue in order to meet its current operating obligations because a fare of eight cents produces the necessary revenues, does it not necessarily follow that a fare of nine or nine and one-eleventh cents or ten cents produces more? To prove that a fare of nine and one-eleventh cents is unreasonably high is it incompetent evidence to so establish by attempting to prove that any fare in excess of eight cents is unreasonably high? If it is contended that the carrier does not need the revenues produced by a fare of nine and one-eleventh cents to meet current operating expenditures, is it incompetent evidence to establish that, by showing that an eight cent fare produces sufficient revenues?

To ask the questions, as above, is to answer them. In the last analysis the issue here presented is not whether the proof appellees sought to present at the hearing of September 28, 1943, was incompetent and immaterial because it directly related to fares of eight, nine and ten cents, but

whether the evidence was admissible at the September 28, 1943, hearing, under the provisions of the hearing order of September 18, 1943, to establish the revenue situation of the carrier as then existing and the propriety of the establishment of the fare under consideration or higher or lower levels thereof.

The hearing examiner admitted that such testimony and evidence was an actual part of the issues involved (O. R. U., p. 2186). Then why was it precluded? That is the reason we contend and have contended that we have been deprived of our day in Court and a full and fair hearing.

3.

The Commission's order of November 2, 1943, makes findings of fact allegedly predicated upon the evidence of record. But neither the findings of fact nor the evidence of record are within the confines of the Commission's legal authority under Section 15a (2).

The basic findings of the Commission in the report and order of November 2, 1943 are as follows:

1. "It is impracticable for respondent to collect a cash fare of 9 cents." (R. 276.)
2. "There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens." (R. 277.)
3. "The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondent, is impracticable." (R. 278.)
4. "The use of an alternative-fare basis of 11 tokens for $1. or a cash fare of a dime for local interstate

passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report as necessary to insure adequate transportation services." (R. 278.)

5. "The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act." (R. 282.)

6. "A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally." (R. 283.)

The findings 1 to 4 inclusive, in the order of November 2, 1943, was predicated upon a request made by the railroad for increased fares allegedly because of a carrier disability. Appellees before the Commission disputed the existence of any such carrier disability. Nevertheless, even assuming the existence of the carrier disability, the Commission is nowhere authorized under the Act to relegate the passengers' right to a reasonable fare to a position subordinate to an alleged carrier disability. The Act provides that every passenger is entitled to a reasonable fare. It precludes the Commission from denying the passenger his inherent right. To the extent that the Commission disregards that passenger right and makes it subordinate to a purported carrier disability it committed grievous error.

United States v. *Northern Pac. Ry. Co.*, 288 U. S. 490;

Montana-Dakota Power Co. v. *Chicago & N. W. Ry. Co.*, 198 I.C.C. 557 (563);

Mountain-Pacific Oil Cases, 192 I.C.C. 599;
E-Z-Opener Bag Co. v. *Illinois Central R. Co.*, 160 I.C.C. 37;
Welch & Welch v. *Southern Pac. Co.*, 142 I.C.C. 267;
Consolidated Southwestern Cases, 123 I.C.C. 203;
Coke Producers' Assn of Connellsville v. *Baltimore & O. R. Co.*, 27 I.C.C. 125.

There is nothing in the Act which permits the Commission to make findings 1 to 4 in a revenue proceeding. The impracticability of passenger fare collecting devices, carrier's disability with respect to accounting methods, and the desire of the railroad to adopt tokens can never justify increased fares under Section 15a(2) or departures from the other standards of regulation set forth in the Act. The only way increased fares could have been authorized by the November 2, 1943, decision was and is necessarily the result of findings of (1) revenue need, (2) the propriety of allocating such revenue need against the local downtown traffic and (3) efficient and economical management of the Hudson & Manhattan Railroad. Such findings were not made. The state of the record precluded them.

While the courts are not concerned with the correctness of the reasoning by which the Commission reaches its conclusions, this obviously means only, if there is substantial evidence to support the Commission's conclusions, the courts will not set them aside merely because the Commission has reached the right conclusions by wrong reasoning. This does not mean that the courts are not concerned where, as in this instance the Commission has reached wrong conclusions, by attributing to evidence, through wrong reasoning, substantial probative value which by right reasoning such evidence is entirely lacking.

Consolidated Edison Company et al. v. *National Labor Relations Board*, 305 U. S. 197; 229;
Virginian Railway Company v. *United States*, 272 *U. S.* 658, 663, 665-666;
Western Paper Makers' Chemical Company v. *United States*, 271 U. S. 268, 270-271;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91.

The Commission's endeavor to justify the ten cent fare in finding number 6 of its report and order of November 2, 1943, is purely arbitrary and capricious. The evidence and testimony of record that resulted in the November 2, 1943, order were and are precisely the same as that which existed in the record at the time of the Commission's report and order of July 11, 1938, 227 I. C. C. 741, which resulted in a finding that the ten cent fare on the local downtown line was illegal, in violation of Section 1 of the Act. Such finding of the Commission was sustained by this court, *Hudson & Manhattan R. Co.* v. *United States, supra.* The record indicates no change in the factual circumstances, and thus the previous report and order of the Commission are still *res judicata.*

While the courts have held that they are not concerned with the inconsistencies between the Commission's findings in a particular case and its findings in other proceedings, this is merely a recognition that the doctrine of *stare decisis* does not necessarily apply to decisions of administrative bodies on administrative questions. It does not preclude the recognition, however, that such inconsistencies, taken in connection with indicia, may constitute cumulative evidence that the Commission's determination in the particular case was wholly arbitrary and capricious.

Passenger Fares and Surcharges, 214 I.C.C. 174;
York Valley Lime & Stone Company, Inc., v. *Pennsylvania Railroad Company*, 186 I.C.C. 763;
Armour & Company v. *Central of Georgia Railway Company*, 81 I.C.C. 33;
Interchangeable Mileage Ticket Investigation, 71 I.C.C. 200;
Natchez Chamber of Commerce v. *Arkansas Harbor Terminal Railway Company*, 58 I.C.C. 310;
Memphis-Southwestern Investigation, 55 I.C.C. 513;
Natchez Chamber of Commerce v. *Louisiana & Arkansas Railway Company*, 52 I.C.C. 105;
St. Louis-Missouri-Illinois Passenger Fares, 41 I.C.C. 584;
Commutation Fares to and from Washington, D. C. 35 I.C.C. 428;
East Dubuque Supply Company v. *Illinois Central Railroad Company*, 28 I.C.C. 425;
The Commutation Rate Case, 21 I.C.C. 426;
Sprigg v. *Baltimore & Ohio Railroad Company*, 8 I.C.C. 443.

As a correlated justification submitted by the railroad for the increase in the downtown fare as approved by the Interstate Commerce Commission, it was suggested that the uptown current ten-cent fare be reduced to the same as that applicable on the downtown line. The Commission in its report and orders of August 3 and November 2, 1943, sought to justify the increase in fares on the downtown line by the corresponding reduction made in the fares on the uptown line[1]. It is axiomatic that every passenger is entitled to a

[1] The uptown fare is not and never has been in issue in this proceeding.

reasonable fare for the particular service involved, irrespective of the level of or earnings produced by fares on some other branch of the railroad.

W. P. Brown & Sons Lbr. Co., Inc. v. *Mobile & O. R. Co.*, 181 I.C.C. 298;
Linton Lbr. Co. v. *Baltimore & O. R. Co.*, 177 I.C.C. 231 (232);
Republic Creosoting Co. v. *Akron, C. & Y. Ry. Co.*, 169 I.C.C. 161;
Sawyer Goodman Co. v. *Chicago, Mo., St. P. & P. R. Co.*, 168 I.C.C. 558 (580);
O. A. Smith Agency, Inc. v. *Atlantic Coast Line R. Co.*, 160 I.C.C. 61;
A. H. Belo Corp. v. *Arkansas & L. M. Ry. Co.*, 160 I.C.C. 77;
Cynamid and Crude Cyanide from Niagara Falls, 155 I.C.C. 488.

The Interstate Commerce Commission in all its findings in these proceedings found that the ten-cent local fare on the downtown line is excessive, unreasonable and in violation of Section 1 of the Act. Such finding was affirmed by this court, *Hudson & Manhattan R. Co.* v. *United States*, *supra*. At the same time the Commission and the courts found that the assessment of a ten-cent fare for the local downtown service in the face of the maintenance of a similar fare on the uptown line constituted undue preference of the uptown passenger and undue prejudice to the downtown passenger. Yet, on the same set of physical structural facts this Commission would now authorize the establishment not only of a ten-cent fare on the downtown line to be used in conjunction with the sale of eleven tokens for one dollar, but in addition the same fare for the uptown line. The at-

tempted prescription as aforesaid, heretofore condemned by the Commission and the courts, is made in the face of the following facts: the average distance from all of the New Jersey stations to the downtown terminus is 2.25 miles, whereas the average distance to the uptown lines terminus averages 4.24 miles with a maximum distance of 5.71 miles. The scheduled running time on the downtown line is 6.4 minutes as against 16.2 minutes on the uptown line, indicative of the amount of the respective services rendered. The daily number of passengers per car trip on the downtown line averages 39.3 as against 24.3 on the uptown line. The operating expense per passenger on the downtown line is 5.16 cents as against 9.73 cents on the uptown lines. The operating ratio of the railroad is 42.7 per cent on the downtown line and 78.9 per cent on the uptown line. In 1941 the downtown branch produced net revenue of $1,707,466. available for bond interest, as against a deficit in the uptown line of $17,435.

Moreover, it was improper for the Commission to justify the increase in the local downtown fare by a reduction of fare on the uptown line because nowhere in the proceedings before the Commission was there any evidence relative to the revenues or traffic situation of the Hudson & Manhattan Railroad with respect to its uptown line. No party to this proceeding ever considered the uptown line in issue. No evidence was submitted by anyone with respect thereto. Any finding or ruling by the Commission with respect to the uptown line is a finding wholly unsupported by the evidence of record.

> "A finding without evidence is beyond the power of the Commission."
>
> *Interstate Commerce Commission* v. *Louisville & Nashville R. Co., supra.*

Accordingly the findings with respect to the uptown line were wholly immaterial and offered no justification for the adjustments sought to be made in the downtown local fares. Therefore, the proposal of the appellant, adopted by the Interstate Commerce Commission, to increase the local downtown fare because of a contemplated reduction in the uptown fare is wholly without merit and finds no support in the Act.

4.

Before appellant railroad is entitled to any increased fares under the revenue section of the Act it must, among other factors, affirmatively establish its need of revenues sufficient to enable it, under honest, economical and efficient management to provide adequate service at the lowest cost consistent with such service.

As hereinbefore indicated this entire proceeding is in the form of a revenue case and its disposition is subject to the provisions of Section 15a (2) of the Interstate Commerce Act (U.S.C., Title 49, Sec. 15a(2)). That section provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such service."

Predicated, as it is, upon this section the only revenue that the Commission can authorize upon a proper showing, is revenue sufficient to provide railroad service, or in other words revenue sufficient to meet current obligations. And even revenue sufficient to meet current obligations cannot be prescribed by the Commission, under this section, unless it is affimatively established that the carrier is "under honest, economical and efficient management." The carrier's dereliction with respect to its joint interline traffic compensation is in and of itself ample justification to establish its lack of honest, economical and efficient management, especially in view of the fact that the Commission in each of its orders in this proceeding (Report and Order July 11, 1938 R. p. 286, 311, affirmed, *Hudson & Manhattan R. R. Co.* v. *U. S.*, 33 Fed. Supp. 495, *Hudson & Manhattan R. R. Co.* v. *U. S.*, 313 U. S. 98; Report and Order of June 8, 1943 R. p. 248, 270; Report and Order of August 3, 1943 R. p. 313, 325) directed the railroad to seek additional revenue from that direction.

The Appellees repeatedly requested the Interstate Commerce Commission to make a specific finding relative to the management of the appellant railroad because the record would support no finding other than that the railroad was not honestly, economically and efficiently managed. Without an affirmative finding by the Commission that the carrier is "under honest, economical and efficient management" there is no justification under the statute and particularly under Section 15a(2) for the Interstate Commerce Commission to authorize increased fares as a revenue measure.

We do not dispute the appellant's contention that any carrier is able to charge just and reasonable fares and that it is entitled to a fair return on its investment if under just and reasonable fares it can earn such a return. The

appellees submit that the eight cent local downtown fare authorized by the Interstate Commerce Commission in its report and order of July 11, 1938 (R. 286) reflects the full maximum reasonable fare. If that maximum reasonable fare earns a fair return on the railroad investment then the railroad is definitely entitled thereto. The issue in this proceeding is not whether the fare of nine cents, nine and one-eleventh of a cent or ten cents represents a maximum reasonable fare. The carrier made no attempt to establish that fact. The issue before the Interstate Commerce Commission was and is whether the carrier should be granted the right to increase its fares wholly by virtue of the authority set forth in Section 15a(2). Section 15a(2) does not require nor authorize the Interstate Commerce Commission to prescribe fares in excess of the reasonable maximum fares for the purpose of permitting a carrier to earn a fair return. Its sole purpose is to permit the carrier to continue to render transportation service to the extent and degree of its current operations. This means that the carrier under Section 15a(2) is to be granted only enough to meet current obligations and then only if all of the provisions presented by Section 15a(2) are met.

There is nothing in the law that would require or permit the Interstate Commerce Commission to guarantee unto a carrier a fair return by taxing one portion of the carrier's entire facilities in an unjust and unreasonable manner. That is precisely what the Hudson & Manhatten Railroad asked the Interstate Commerce Commission to do in connection with the downtown local patronage. In view of the Commission's previous findings "that under normal circumstances the saturation point in increased fares (referring to the eight cent fare) on that traffic (referring to the downt wn traffic) has about been reached" (R. 270), it would appear that the Commission in contradiction of its

own prior finding would now impose the entire burden of providing a fair return to the carrier upon the downtown local patron, in conformity with the railroad's contention but in contravention to the provisions of Section 15a(2).

It has been and is the position of the appellees that the appellant could secure a fair return on its investment without any increase in the downtown line fare over and above the current eight cent fare if its divisional arrangements with the Pennsylvania Railroad were established on a proper, equitable and just basis. Such adjustment in interline traffic divisions would satisfy the directives of the Interstate Commerce Commission as aforesaid, and would remove from the carrier the stigma of managerial dereliction which now attaches to it.

Realizing that it was error for the Commission to have refused to entertain the evidence which would have established a 30% increase over 1941 traffic, and hence satisfy the revenue required to meet the interest on bonded indebtedness, the railroad now urges that (a) the Commission could not legally limit appellant to its present eight cent fare merely because appellant, due to increased 1943 traffic might, under such fare earn its current bond interest[1] (Railroad's brief, p. 61). The fact of the matter is that the Commission could have legally limited and would in fact be required to limit the appellant to such fare, under Section 1 of the Interstate Commerce Act (U.S.C. Title 49 Sec. 1), where to permit a fare in excess thereof would have resulted in an unreasonable and

[1] When the railroad sought its increase resulting in the Order of June 8, 1943, the railroad predicated its right to an increase on increased operating expense and bond interest. The Commission stated the position of the railroad as follows: "The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest of its bonds" (p. 269).

therefore illegal fare. The Interstate Commerce Commission could not have legally permitted an increase in a fare under Section 15a(2) of the Interstate Commerce Act (U. S. C., Title 49 15a(2) unless it found: (1) revenue need; (2) that the carrier was under honest, economical and efficient management; and (3) that the revenue so needed was necessary to continue the operations of the road, or in other words, to meet current obligations.

Appellant railroad further claims that (b) the Commission could not have legally limited nor did it intend to limit appellant to the revenues which in the report of July 11, 1938, it estimated appellant would earn under such eight cent fare. (Railroad's brief p. 67.) The intention of the Interstate Commerce Commission is set forth in full in its report of July 11, 1938. It clearly stated in unequivocal language that the eight cent fare therein proposed would produce annual revenue available for bond interest of $2,260,817 (R. 311), or $541,000 less than required. Such limitation proposed by the Commission upon the Hudson & Manhattan Railroad's local downtown revenue was upheld by the Courts, *Hudson & Manhattan* v. *U. S.* 33 Fed. Supp. 495; *Hudson & Manhattan R. R. Co.* v. *U. S.* aff'd 313 U. S. 98. That the Commission intended that the carrier would be limited to the revenues under the downtown local fares in the manner as aforesaid is further indicated by its directive to the Hudson & Manhattan Railroad to seek a further increase in revenue from its interline traffic. (R. 311.)

Appellant finally contends that (c) the Commission could not legally have limited nor did it intend to limit appellant merely to the revenues which the Commission in its report of June 8, 1943 estimated appellant would earn under the nine cent fare therein authorized (Railroad's brief, 67). That the Commission intended the carrier to be so limited

is indicated by the directive to the carrier to seek any and all additional revenues that it might require from its joint interline traffic. (R. 270.)

The legality of the Commission's limitation of revenues under the nine cent fare is no different from its limitation under the eight cent fare indicated above, which limitation was reviewed by the courts and found proper.

5.

The imposition of a cash fare of ten cents for any downtown local service is unreasonable and unduly discriminatory and in violation of the Interstate Commerce Act.

The report and order of the Interstate Commerce Commission dated July 11, 1938, which were the subject of review and affirmance by this Court contained the following finding:

> "In this connection, however, it is noteworthy that the cost per passenger to respondent in the uptown service is evidently substantially greater than that in the downtown service. This is apparent, not only from the difference in the hauls, but from the number of passengers per car transported on the respective lines. Thus, during the morning and evening peak traffic the average number of passengers per car to and from New York on a typical week day is, respectively, 80.8 and 85.8 downtown and 53.1 and 73.3 uptown; and during the 24-hour period, 42.2 downtown and 22.8 uptown. The combined average of the two is 34.6 passengers per car. From the standpoint of the cost of the service to respondent, therefore, as well as of the value of the service to the passenger, it would seem

that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents." (R. 301.)

It is apparent from the above quotation that the unreasonable and discriminatory nature of the proposed ten cent downtown local fare flows directly from the similarity or sameness of that fare with the existing uptown fare and this because of the substantial difference in the services rendered to the downtown against the uptown patrons. The unreasonableness here is one of relativity. Conjecture, seeking to determine what a maximum reasonable fare for the uptown service may be, is meaningless. The reasonable uptown fare was and always has been ten cents. "A rate established by the carrier within the limits of the Commission's order becomes a lawful, that is, a reasonable rate." *Arizona Grocery Co. v. Atchison T. & S. F. Ry Co.*, 284 U. S. 370. It is only the existing fare that affords the proper basis for comparison.

The test in the instant case is the measure of the downtown proposed fare compared with the existing uptown fare. Such comparison is the best test of reasonableness. The Act recognizes no distinction between relative unreasonableness and intrinsic or absoluate unreasonableness. *Illinois Cork Co. v. Akron C. & Y. Ry. Co.* 200 I.C.C. 381.

That which the Commission and the courts condemned, namely the sameness of the fare on the downtown and uptown line is again proposed by the railroad and authorized by the Commission, even though not a single change has occurred in any of the basic facts that heretofore resulted in condemnation of the ten cent proposed downtown fare in the face of the concurrent ten cent uptown fare.

Moreover, the Commission has affirmed and re-affirmed its determination, in all of the orders and reports dealing

with a ten cent fare on the downtown line, that the imposition of a ten cent fare for that service is unreasonable, and because of its unreasonableness has refused to authorize it. Yet by this very modified order of November 2, 1943, it did the very thing it has repeatedly condemned and imposed a downtown fare of ten cents.

6.

The appellees exhausted all administrative remedies before instituting proceedings in the District Court.

Following the railroad's petition of July 27, 1942, for rehearing and the holding of further hearings as the result thereof, the Commission issued its report and order of June 8, 1943, 255 I.C.C. 649. Therein it affirmed its original conclusion that the ten cent fare proposed for application on the local downtown interstate line had not been justified. A nine cent fare was prescribed for the duration plus six months thereafter. Subsequent thereto, on July 8, 1943, the railroad filed an additional petition seeking reconsideration and modification of the findings of the Commission in its June 8, 1943 order, because of certain alleged carrier disabilities which it was claimed precluded the carrier from satisfactorily collecting the nine cent fare. Although the appellees seasonably answered that petition and requested the Commission to assign the matter for further hearing before taking any affirmative action, so as to accord all parties their proper and due day in court, the Commission nevertheless, without further hearing or other action, issued its report and order on reconsideration dated August 3, 1943. Therein, with one stroke of the pen, the Commission destroyed all which

had been determined from a full hearing before the Commission. Although the report of August 3, 1943, affirmed the previous finding that the proposed ten cent fare had not been justified for *general* application on the local downtown interstate line, it permitted an increase over and above the fare of nine cents theretofore prescribed, by authorizing an alternative fare basis of eleven tokens to be sold for one dollar or a cash fare of ten cents payable only by a dime. Without the receipt of any further and additional evidence, the Commission arbitrarily and capriciously, while finding that a ten cent local interstate downtown fare had not been justified, actually authorized the application of a ten cent fare as an alternative basis.

The action of the Commission in its report and order of August 3, 1943, was so unorthodox that the only avenue of relief available to the appellees was resort to court action. A bill of complaint was filed by the City of Jersey City on September 13, 1943, in the United State District Court for the District of New Jersey seeking to have the order of August 3, 1943, enjoined. Before hearing on that bill of complaint and corollary application for a temporary restraint, the Interstate Commerce Commission, on its own motion, reopened its order of August 3, 1943, and set the matter for further hearing. As evidence of the Commission's fixed attitude in connection herewith reference need only be made to the order reopening the August 3, 1943, decision and setting the matter for further hearing. The whole intent and purport of the reopened hearing, as subsequently established, was not to accord the appellees their requisite day in court, but to secure evidence and facts from appellant railroad to justify the Commission's conclusions. Constantly throughout the hearings objections were made to the circumscribed scope thereof. Con-

stantly and repeatedly efforts were made to introduce probative testimony and evidence. The propriety and urgency of such action was conveyed to the presiding examiner and he was, in turn, requested to convey such requests to the Commission. All this was to no avail.

On October 14, 1943, shortly after the hearing of September 28, 1943, appellee, Office of Price Administration filed a formal motion with the Interstate Commerce Commission for reopening of the proceeding:

> "For the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues, over and above those in effect on September 15, 1942, under the Interstate Commerce Act and the Act of October 2, 1942." (R. 275.)

On October 25, 1943, the City of Jersey City adopted and otherwise ratified the aforesaid motion of the Office of Price Administration as though it were its own. (R. 389.)

In filing the motion, as aforesaid, after appellees were denied the right of introducing testimony in an orderly manner in the reopened hearing of September 28, 1943, reliance was placed, in part, upon the Commission's statement in its order of June 8, 1943, 255 I.C.C. 649 that any party was at liberty to bring to the attention of the Commission changed conditions. (R. 271.)

In its report and order of November 2, 1943, the Commission disposed of the aforesaid motion by stating:

> "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearings sought were

held, we would feel warranted in modifying our findings as made in the second report." (R. 275.)

Not only did the Commission clearly indicate, by the above quoted statement, that it would not entertain any further or additional petitions or motions for further hearing and that such new evidence would not be received, but it went further and permitted the carrier to file and make effective the new tariffs on fifteen days notice. The Commission then took the position that it was without power to further suspend the tariffs. It is apparent that had the appellees individually or jointly filed an additional petition or motion with the Interstate Commerce Commission it would merely have been a futile gesture. It is a fundamental rule of law that no litigant need perform an act which would in effect be a mere useless ceremony.

Nowhere do the statutes require that litigants must request a rehearing of the Interstate Commerce Commission before suit may be instituted in the courts. In *Baltimore & Ohio R. R. Co.* v. *U. S.*, 298 U. S. 347, 371, the Supreme Court held:

> "No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the Commission prescribing rates or divisions."

We respectfully submit that the appellees completely exhausted all of their administrative remedies. They had no other recourse than to go before the District Court.

7.

Jersey City was not estopped from either asking the Commission to receive the tendered evidence or from seeking an injunction based on the Commission's refusal to receive such evidence, nor is it estopped from seeking an injunction against the order of the Commission of June 8, 1943.

The Interstate Commerce Commission in its report and order of June 8, 1943, in finding that the proposed ten cent passenger fare for application on the local downtown line had not been justified did so without prejudice to the establishments of a local downtown fare of nine cents. Shortly prior thereto the Interstate Commerce Commission in *Increased Railway Rates, Fares and Charges, 1942*, 255 I.C.C. 357, found, in a report and order decided April 6, 1943, and formally distributed several weeks thereafter that the increased fares, rates and charges that had been previously authorized because of abnormal war time conditions were, in large part, no longer necessary nor justified. In so finding the Commission said:

> "Government authorities, particularly the Office of Defense Transportation, have urged the public not to travel except when the journey is related to the war effort or if for an essential purpose. A reduction in the standard passenger fares would tend to encourage travel which is unnecessary and unrelated to the prosecution of the war. With passenger facilities taxed to their capacity, any substantial increase in such unnecessary travel inevitably would hasten the rationing of passenger travel.
>
> "Commutation travel is confined largely to the few local areas in the vicinity of large cities. It is gov-

erned mainly by local conditions rather than considerations that must control when the body of freight rates and passenger fares as a whole is under review. The commutation traffic undoubtedly has been subjected to increased costs, similar to those borne by other traffic, but whether the conditions under which the services are rendered and the volume of traffic offset these increased costs remains somewhat in doubt. The question whether the basic commutation fares should be increased requires further investigation. We therefore shall resume investigation of commutation fares at the stage where this proceeding began, and will invite the cooperation of the regulatory bodies of the States particularly interested, with a view of determining what, if any, changes should be made in these fares in order that the national transportation policy may be carried out and an adequate transportation system and essential commutation service may be maintained during the war emergency.

"We find that no modification of our previous findings, orders and authorizations respecting the present interstate standard passenger fares is necessary. We further find that the authority heretofore given with respect to the increase in commutation fares should be revoked, and that the question whether any increase should be made therein, in order to accomplish the purposes of the national transportation policy and the Interstate Commerce Act, should be investigated further by us as respects interstate commutation transportation. In that investigation, which will be independent of the present proceeding, as above indicated, we shall invite the cooperation of the regulatory authorities of the State as concerns their intrastate commutation traffic."

It is conceded by all parties to this proceeding that the traffic of the Hudson & Manhattan Railroad is fundamentally and preponderantly commuter traffic. The railroad is an electric interurban commuter line. That being

the case the findings relative to commuter traffic and commutation fares in the proceeding above quoted, must apply equally to the commuter traffic and fares of the Hudson & Manhattan Railroad.

It was apparent to the appellees that the Commission in promulgating its report and order of June 8, 1943, as aforesaid, failed to give consideration to its own action of April 6, 1943 in *Increased Railway Rates, Fares and Charges, 1942, supra,* wherein it revoked commutation fare increases in that it stated in its June 8, 1943 report:

> "If respondent (railroad) had availed itself of the authority granted by our order of January 21, 1942, in *Increased Railway Rates, Fares and Charges, 1942, supra,* the downtown fare would now be nine cents. An increase to that amount would be consistent with that decision."

The appellees had available to them the alternative procedure of filing a petition with the Commission for reopening and reconsideration of its report and order of June 8, 1943, or of awaiting the publication of the nine cent fare in tariff form as required by the Act (U.S.C. Title 49, Sec. 6(1)) and prior to the effectiveness thereof requesting suspension in accordance with the provisions of the Interstate Commerce Act (U.S.C. Title 49, Sec. 15(7)). It chose the latter course as the most expedient and proper. It accordingly awaited the publication of the nine cent fare in tariff form. That nine cent fare was never so published, and hence the appellee never had the opportunity of requesting suspension to consider the propriety of the establishment of the nine cent fare in view of the changed facts and conditions, namely, the revocation of the authorization by the Interstate Commerce Commission to the railroads to increase their com-

muter passenger fares 10% as indicated in the excerpt hereinbefore quoted.

In lieu of the publication and filing of a nine cent fare in tariff form as prescribed by the statute, the appellant railroad filed its petition of July 8, 1943, seeking reconsideration and modification of the findings of the Commission contained in the report and order of June 8, 1943. That petition sought through the medium of an affidavit attached thereto, to secure a modification of the order of June 8, 1943, and an increase in the authorized nine cent fare without the necessity of the usual customary formal hearing. The appellant sought to accomplish this by attempting to formulate its own rules of practice. It demanded the appellees to reply to its petition by a verified answer even though the general rules of practice of the Interstate Commerce Commission do not require such a verification. When appellees replied, the railroad did not formally object to the lack of the verification.

When the Interstate Commerce Commission on August 8, 1943, predicated upon the petition of the appellant railroad, as aforesaid, revised its order of June 8, 1943, by increasing the authorized fare consistent with the request of the railroad, it became apparent that the filing of a petition for reopening and rehearing would be futile. Resort was had to the courts, not for the purpose of testing the level of the rate prescribed or the sufficiency of the evidence upon which that report was based but rather for the sole purpose of assuring to the appellees their requisite day in court and a full and fair opportunity to be heard on all of the material and probative evidence. The original complaint filed in this suit was to that effect.

Thereafter, the Interstate Commerce Commission, taking full cognizance of the propriety of the appellee's

allegations as contained in that complaint and in acknowledgment thereof, of its own motion reopened the proceedings for further hearing. The hearing of September 28, 1943, followed. The attitude of the Commission and its predetermination of all of the material issues herein was evident from the very opening of that hearing. At the conclusion of such hearing and after the promulgation of the Commission's report and order of November 2, 1943 (R. 272), the appellees being thoroughly convinced that it would be futile to further address the Commission on the materiality of the revenue issues which they contended should necessarily have been incorporated in the record and made the basis for any proper revenue finding, filed its amended complaint in the District Court. Such amended complaint, among other things, attacked the propriety of any fare in excess of eight cents, the fare then in effect and necessarily brought into question the order of June 8, 1943, which authorized a fare in excess of eight cents.

The appellants' endeavor to set up the doctrine of estoppel as a barrier to the appellees, in view of the facts as aforesaid, is without foundation.

Conclusion.

It is respectfully submitted that the decree of the lower court enjoining the orders of the Commission insofar as they increased the fare over eight cents should be affirmed so that the *status quo* may be maintained until such time as the Interstate Commerce Commission affords to the appellees a full and fair hearing. The decree of the lower court specifically remanded the proceedings to the Interstate Commerce Commission for further hearing and reconsideration (R. 220). An injunction pending the further

hearing was necessary in order to prevent the higher fare from going into effect. Compliance with this provision of the decree is not only necessary but would have been the logical and simple procedure to follow. Instead, both appellants burden this court with an appeal.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for
City of Jersey City.

CHARLES HERSHENSTEIN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

CITY OF JERSEY CITY AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM ON BEHALF OF THE UNITED STATES

In the court below the United States was named in the amended complaint as a defendant pursuant to Section 211 of the Judicial Code (28 U. S. C. 48). Following the application of the Director of Economic Stabilization for leave to intervene, the United States filed its answer to the amended complaint, neither admitting nor denying the allegations thereof, and assigning as reason for its neutrality the fact that the case involved a controversy between two agencies of the federal government, each of which would have an opportunity to present its position through its own counsel. The same situation prevails in this

Court, in that both the Interstate Commerce Commission and the Director of Economic Stabilization (by the Price Administrator), the latter with the authority of the Solicitor General, have presented or will present their views to the Court by briefs and oral argument. Accordingly, in this Court as in the court below the United States takes no position on the issues, much controverted between the parties, as to whether the Interstate Commerce Commission, in approving certain fares to be charged by the appellant Hudson & Manhattan Railroad Company, properly applied the standards of Sections 1 (5) and 15a (2) of the Interstate Commerce Act, and as to whether the record before the Commission contained substantial evidence to support its orders of June 8 and November 2, 1943. However, the grave public necessity of economic stabilization and resistance to inflationary tendencies in the national price structure impels the United States to file this memorandum dealing with certain considerations arising out of the operation of the Emergency Price Control Act of 1942, the Inflation Control Act of 1942, and Executive Orders Nos. 9250, dated October 3, 1942, and 9328, dated April 8, 1943. These considerations, we believe, dictate the conclusion that the decree appealed from, setting aside the Commission's orders of June 8 and November 2, 1943, should be affirmed by this Court for substantially the reasons set forth by the court below in its opinion. These reasons are,

briefly, (1) that the Commission failed to accord to the Director of Economic Stabilization the full and fair hearing required by law, and (2) that the Commission failed to give effect to the economic stabilization program and the efforts of the national government to keep down the cost of living.[1]

1. We do not understand any claim to be made that prior to the order of June 8, 1943, the Director of Economic Stabilization or the Price Administrator was in any way improperly precluded from introducing evidence relevant to the issues before the Commission, or otherwise unduly restricted in participation in the proceedings. So far as the right to a fair hearing is concerned, the impropriety of the Commission's actions lies in the limitation which it imposed on the scope of the reopened hearing convened under the order of September 18, 1943, and in its denial of the Director's motion of October 14, 1943, for a modification of that order so as to remove the limitation on the scope of the hearing. By this limitation, and its retention over the Director's protest, the Director was, we believe, deprived of the opportunity and right to which he was legally entitled, of presenting evidence bearing most di-

[1] We advance these grounds for affirmance of the decree without consideration of, or prejudice to, the arguments made separately by the Director that the Commission's orders were not supported by evidence in the record and were based on an erroneous construction of the Interstate Commerce Act.

rectly upon the issue which still lay open before the Commission—namely, whether to permit a general increase in the rates of a common carrier.

For, regardless of the purported limitation on the scope of the reopened hearing provided for by the order of September 18th, the real issue still before the Commission was whether to permit a general increase in the rates of a common carrier. The Commission, it is true, had already in its order of June 8th passed upon the application for approval of a ten cent fare on the down-town line, found such a fare unjustified, and approved a nine cent fare. But the company's own petition for reconsideration of that order had shown that the nine cent fare was impracticable, and had requested that some other fare be approved. The question before the Commission, therefore, on the petition for reconsideration was what fare would comport with the standards of the Interstate Commerce Act and the national stabilization program, assuming that a nine cent cash fare was precluded. The answer, among others, might have been continuation of the eight cent fare, increase to a ten cent fare, or compromise on the alternative of a ten cent cash fare or eleven tokens for a dollar. The latter proposal was urged by the company in its petition for reconsideration; but the mere fact that the company had made a specific proposal could not limit the jurisdiction and the responsibility of the Commission to consider other possibilities which might be more reasonable

and more closely consonant with the public interest.

The answer of the Commission, that it had already determined the reasonableness of the nine cent fare, so that there was no need for further hearing except as to the "propriety and lawfulness of the modifications" (R. 24), underlines the weakness of the Commission's position. The determination that a nine cent fare was reasonable had been based on a record closed in September, 1942, and containing financial data down only to August, 1942. We do not suggest that the Commission did not proceed with reasonable dispatch in issuing its report and order of June 8th; and if collection of the fare approved in that report and order had been feasible the case might well have ended there. But when the Commission on petition of the company reopened the case, we submit that it necessarily reopened the issue of whether a nine cent fare, however reasonable it might have been as of August, 1942, was still reasonable as of August, 1943. The eight cent fare was still operative, the June 8th order was in effect withdrawn, and the Commission was faced with the necessity of deciding whether to reaffirm its original conclusion, or to accept the company's substitute proposal, or to approve some entirely different fare. Whichever it did it would be issuing a new final order, and it was subject to a duty to base that new order as nearly as practicable on an appraisal of current conditions.

Doubtless the Commission, like other regulatory agencies, has a wide range of permitted discretion in determining when the record made before it is sufficient to justify a conclusion, and whether a rehearing is necessary to advise it fully of the relevant facts. The right of a party to demand a rehearing because of changed economic conditions does not, as this Court said in *United States* v. *Northern Pacific Ry.*, 288 U. S. 490, extend to every insignificant fluctuation, and "may not be invoked where its application would disenable the Commission to protect the interest of the public." But there are limits on the Commission's discretion in this respect, as is shown by *Atchison Etc. Ry. Co.* v. *United States,* 284 U. S. 248, where, at p. 262, this Court said:

> In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right.

By the same standard we believe that the Commission here denied to the Director the fair hearing to which he was legally entitled. It is not

sufficient to say, as the Commission does (Br. pp. 39–40), that the *Santa Fe* case is inapplicable because there two and a half years had elapsed between the closing of the record and the petition for rehearing. As the Court in that case (p. 260) took judicial notice of the occurrence of the 1929 crash, so it can take judicial notice here not only of the effects of gasoline rationing and other like factors upon the passenger traffic of interurban and commuting transportation systems, but also of the pervasiveness and lightning-like rapidity of inflationary episodes. Regardless of whether the evidence offered by the Director would if fully considered have required a change in the Commission's ultimate conclusion—a question which we do not touch—it seems almost self-evident that conditions bearing on the reasonableness of a fare on the Hudson & Manhattan Railroad could not be the same in August and September, 1943, as they had been in August, 1942. Apart from the Commission's duties under the Interstate Commerce Act, its responsibilities to the stabilization program required that it consider *current* conditions so far as practicable before issuing an order which would, as its order of November 2, 1943, did, approve a general increase in a carrier's rates. Refusal to accept an offer by a coordinate agency of the federal government, itself a party to the proceeding, to prove that current conditions so far as they bore on the propriety of such a general increase had radically

changed since the close of the hearings was, we submit, an abuse of discretion and a denial of the full and fair hearing to which the Director was legally entitled.

2. Much of what we have said bears also on the second ground found by the court below for its holding that the Commission's orders were invalid—namely, that the Commission itself "failed to give effect to the economic stabilization program and efforts of the national government to keep down the cost of living" (R. 217). For by its action in declining to consider evidence relevant to the issue before it, the Commission not only deprived the Director of a legal right; it deprived itself of the materials for a proper decision. It was not, as the Commission suggests (Br. p. 39), the reopening of the hearing proposed by the Director, but the Commission's refusal to reopen it, that served to "disenable the Commission to protect the interest of the public." This refusal in itself is sufficient to reflect on the adequacy of the consideration given by the Commission to wartime conditions and the stabilization legislation.

The court below suggested (R. 199) that this phase of the case had been "lightly brushed aside" by the Commission, and with this we agree. To be sure, the Commission says it considered the dangers of inflation, and it quotes in its brief statements which it has made in other contexts as to its part in the fight against those dangers

(Br. pp. 50–59). But the record in this case gives little support to the Commission's protestations. To the earnest arguments of the Director that even a small increase in fare "would have a substantial bearing upon the cost of living in the communities served" by the railroad, the Commission saw fit only to answer (R. 266, 270–271; Br. pp. 54–55):

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible.

So casual a dismissal of the protests of the Director seems to us fully to warrant the conclusion of the court below (R. 201):

> * * * that the Commission has failed to consider the dangerous, cumulative effect of the present allowed increase in connection with all the other cumulative sources of inflation, perhaps small in themselves, but tending collectively to defeat the vital policy of controlling inflation as indicated in the above referred to Executive Orders of the President and the Act of October 2, 1942.

We readily concede, as suggested by the Commission (Br. p. 56), that the burden of the war on inflation does not rest solely on the Director of

Economic Stabilization and the Price Administrator, but must be shared with the Commission. By this very fact the Commission is obligated to scrutinize proposed fare increases with the utmost keenness, and to reject them in the absence of a convincing showing of their necessity. By declining to consider the proffer of the Director's evidence as to current necessity for the increase, and lightly disposing of the problem of inflationary tendency by mere reference to its quantitative aspect, the Commission, we believe, failed adequately to discharge the duty that it insists rests upon it. Its failure to raise its sights to the level of wartime conditions and the national economic policy constitutes an error of law of sufficient gravity to demand the injunctive action taken by the court below.

3. Though various of the points in issue on this appeal were also involved in *Vinson* v. *Washington Gas Light Co.*, No. 396 this Term, decided March 27, 1944, adversely to the contentions of the Director there made, we do not believe that that case concludes the issues now presented. Whatever may have been the situation there, here no claim can reasonably be made that the Director's contentions would tend toward "paralyzing or extinguishing local institutions," or that affirmance of the decision below would amount to "the limitation of existing powers conferred by law on regulatory commissions * * * and the endowment of a different federal agency with new and superior rights and powers." The action of the court below

confers no powers upon the Director, and subtracts none from the Commission. It in no way limits the right and duty of the Commission to serve as the responsible administrator of the Interstate Commerce Act, subject only to the usual judicial power of correction. The court below exercised that power of correction not because of any arrogation of conflicting authority by the Director, but because the Commission in its own quasi-judicial sphere misconceived the law and improperly excluded evidence which the Director offered on the issues which the Commission itself had framed. In the *Washington Gas Light* case the sliding scale arrangement, which the Director sought to reexamine, had been in effect for many years; its termination was not in issue in the hearing in which the Director had intervened, and the Public Utilities Commission indeed claimed that it could not be terminated without notice, which had not been given. The Director, in the interest of the stabilization program, was concededly seeking to disturb at least some aspects of a status, in a hearing not convened for that purpose. Here, on the other hand, the status consisted of the eight cent fare, which had been in effect since 1938 and for that matter is still in effect. The issue framed by the Commission when it opened the hearing was whether it should heed the company's petition to revise that status upward, and if so how far. That was the issue when the Commission handed down its first report and order on June 8, 1943, and that was still the issue

when because of impracticability asserted by the company the order of June 8th was in effect revoked and the hearing reopened. In spite of the Commission's attempted segmentation of the issue into artificial components, the fact remains that when the Director asked leave to adduce evidence at the hearing on September 28th and 29th, and upon denial asked to have the limitations of that hearing removed, he was asking to be heard on an issue framed by the Commission and still before it. The Commission's refusal amounted to an insistence that it could with propriety divide the issue into the two separate phases of increase *vel non* and mechanical modification, and could insulate the former from further discussion. This insistence, when the factual record before the Commission was already more than a year old, is, we submit, the strongest indication of the Commission's failure to give adequate consideration to the dangers of inflation which it as well as the Director is required to combat, and fully justifies the conclusion of the court below that the Commission's orders gave insufficient effect to the economic stabilization program and therefore should be set aside.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
CHESTER T. LANE,
Special Assistant to the Attorney General.

MAY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 2 1944
CHARLES ELMORE CROPLEY
CLERK

No. 767

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

THE CITY OF JERSEY CITY, FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF ON BEHALF OF THE ECONOMIC STABILIZATION DIRECTOR, APPPELLEE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Counter statement of the case	2
Questions presented	31
Summary of argument	32
Argument:	
A. The Economic Stabilization Director was legally authorized to intervene, in defense of a legally recognized interest, to challenge the Commission's order and was subject to no procedural disabilities in so doing	37
1. The Director, having been designated by the President pursuant to Section 1 of the Stabilization Act, is charged with the duty of intervening in rate increase proceedings to protest increases where, as here, the increase is contrary to the interests of the wartime stabilization program	37
2. The Court properly held the Director exhausted his administrative remedy	41
3. "Estoppel" cannot be invoked against the Director as a reason against injunction proceedings or to justify the Commission's refusal to receive evidence designed to show that the carrier was entitled to no increase over its present 8-cent fare	43
B. The reopened hearing to consider the company's petition for an alternative-fare basis of 11 tokens for a dollar or a 10-cent cash fare was a proceeding not to consider a mere mechanical correction of a prior determination, but an increase in fare above the level previously authorized by the Commission. Hence the Commission's action in narrowing the scope of the reopened hearing to exclude inquiry into the lawfulness and propriety of the fare increase was an arbitrary and unreasonable refusal to grant a full and fair hearing	46
1. The Commission's obligation to grant a full hearing as to the lawfulness and propriety of the higher alternative-fare basis could not be evaded on the theory that, because the higher alternative fare could not be "expected to yield materially better revenue results" to the carrier than the Commission "anticipated at the time of" the June 8 order, it was merely a mechanical correction of the June 8 order	46

585280—44—1

Argument—Continued. Page

2. Moreover, the Commission's assumption that the alternative-fare basis would not yield materially higher revenues to the carrier was contrary to the only reliable or probative evidence of record on the use of tokens, despite the Commission's Procrustean effort to stretch that evidence to sustain its erroneous conclusion that a "90–10-percent use ratio * * * appears to us to be within the range of probable achievement under the proposed fare basis" 50

C. The Commission acted arbitrarily in rejecting the testimony offered by the Director which, by bringing the rapidly changing wartime conditions down to a reasonably proximate period, would have shown that no fare increase was required since, without any fare increase, the company's income had risen to substantially the level which the company had set as its goal when it initiated the proceeding in June 1942, and which the Commission in its June 8, 1943, order had found necessary to insure adequate transportation service 59

1. The record on which the Commission's order of November 2, 1943, was based was stale, especially in view of the importance to effective stabilization that determinations as to rate and fare increases be based upon current data .. 59

2. The importance of a fresh record to the establishment of just and reasonable fares in this proceeding was rendered critical by the special circumstances of the case, namely, that the proceeding was initiated on the basis of changing conditions and revenue needs and that the Commission's June 8 order not only was based on a calculation of revenues to be obtained under changed conditions but also declared the Commission's willingness to modify its order whenever a further change of conditions should render the revenue results to the carrier "materially different" from those estimated 67

3. The carrier is in error in its contention that the decision of this Court in *Vinson* v. *Washington Gas Light Co.* that the restriction on the scope of the particular proceeding there involved was reasonable, constitutes a holding that the Director had no "standing before the Commission entitling him to tender" evidence of this carrier's income under wartime conditions as bearing upon its right to a rate increase 70

Argument—Continued. Page

4. The company's contention, raised for the first time on this appeal, that, since the appellees did not show that the 8-cent fare would have yielded a fair return on fair value or that the increased fare would have exceeded such a return, the evidence tendered by the Director was irrelevant, is unjustified since the Commission did not find the fair value of the company's railroad properties and the company presented no evidence nor did it request that any findings be made on that issue 74

D. The Commission's orders were unlawful under Sections 1 and 15a (2) of the Interstate Commerce Act, properly construed and applied in the light of wartime economic conditions and governmental controls 77

1. Even though the proviso to Section 1 of the Stabilization Act imposes no limitation on the Commission's authority under the Interstate Commerce Act, nevertheless, the Commission was obligated, in applying the standards prescribed by its own Act, to give consideration and effect to wartime conditions and the stabilization program 77

2. On the record before the Commission, it could not reasonably conclude that the increased fare which it authorized was "the lowest cost consistent with the furnishing" of "adequate and efficient railway transportation service" or that it was necessary to meet "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" 83

3. Measured by its impact on the company's investors and patrons, the Commission's action in increasing the fares on the downtown line was unwarranted and inconsistent with the national stabilization policy. The increase should have been denied as unjust and unreasonable 90

a. The investor's interest 91

b. The user's interest 94

Conclusion 96

Authorization 96

Appendix of statutes and Executive orders 97

TABLE OF CASES

	Page
Acker v. *United States*, 298 U. S. 426	61
American Toll Bridge Co. v. *California R. R. Comm.*, 307 U. S. 486	90
Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 284 U. S. 248	60
Baltimore & Ohio R. R. v. *United States*, 298 U. S. 349	43, 60
City of Jersey City, etc. v. *The United States of America, etc.*, Civil Action No. 3073, D. C. N. J.	80
Covington and Lexington Turnpike Co. v. *Sandford*, 164 U. S. 578	90
Davies Warehouse Co. v. *Bowles*, — U. S. —, 88 L. Ed. 379, 64 S. Ct. 474 (1944)	39
Fed. of Citizens' Assns. v. *Cap. Tran. Co.*, 47 P. U. R. (N. S.) 187 (1943)	55
Hudson & Manhattan R. R. Co. v. *United States*, 33 F. Supp. 495 (1940)	88
Hudson & Manhattan R. R. Co. v. *United States*, 313 U. S. 98 (1941)	2, 3, 88
Increased Railway Rates, Fares and Charges, 1942, Ex Parte 148, 248 I. C. C. 545	64, 80, 95
Increased Railway Rates, Fares and Charges, 1942, Ex Parte 148, 255 I. C. C. 357	64
Lincoln Savings Bank v. *Brown*, 137 F. 2d 228	81
Local Fares of the Hudson & Manhattan R. Co., 58 I. C. C. 270	3, 12, 13, 17, 18, 21, 92
N. L. R. B. v. *Ind. & Mich. Elec. Co., 318 U. S. 9*	75
Passenger Fares of Hudson & Manhattan R. Co., 227 I. C. C. 741	2, 3, 12, 14, 16, 17, 18, 19, 20, 21, 23, 39, 87
Passenger Fares of Hudson & Manhattan R. Co., 255 I. C. C. 649	1, 5, 13, 15, 16, 22, 24
Passenger Fares of Hudson & Manhattan R. Co., 256 I. C. C. 269	2, 6
Passenger Fares of Hudson & Manhattan R. Co., 256 I. C. C. 507	1, 7
Philadelphia Coke Co. v. *Chester Bowles*, U. S. Emergency Court of Appeals, December 15, 1943	81, 82
Spring Canyon Coal Co. v. *Comr. of Int. Rev.*, 43 F. 2d 78, cert. den., 284 U. S. 654	86
State of Minnesota v. *St. Paul City Ry. Co.*, 7 P. U. R. (N. S.) 174	55
United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490	61
U. S. Gypsum Co. v. *Brown*, 137 F. 2d 360	81
Vinson v. *Washington Gas Light Co.*, — U. S. —, 64 S. Ct. 731 (1944)	39, 70, 72, 76, 91
Washington Gas Light Co. v. *Byrnes*, 137 F. (2d) 547 (Ct. of Appeals, D. C.)	73

STATUTES AND EXECUTIVE ORDERS

	Page
Commerce Court Act, section 5, c. 309; 36 Stat. 539, 543, 28 U. S. C. section 45a	2
Emergency Price Control Act of 1942, 56 Stat. 23	78, 98
Executive Order No. 9250, 7 Fed. Reg. 7871	100
Executive Order No. 9328, par. 4; 8 Fed. Reg. 4681, 4682	102
Interstate Commerce Act:	
49 U. S. C., Section 1	35, 77, 97
Section 15a	35, 77, 78, 97
Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345	2
Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765	32, 35, 37, 77, 99
Urgent Deficiencies Act, c. 32, 38 Stat. 208, 219-221, 28 U. S. C., sections 45, 47a	2

MISCELLANEOUS

Amendment 37 to Rationing Order 5C, 8 F. R. 3616, dated March 20, 1943	62
Amendment 5 to Supplement 1 of OPA Order 5C, 8 F. R. 7391, dated June 1, 1943	63
Bureau of Labor Statistics of the Department of Labor, document Serial No. R. 1156, March 15, 1940, Table 2, page 6; id. L. S. 43-5934, Table No. 1	95
88 Cong. Rec. p. 7740	38
Fitch Bond Record, Quotation Edition No. 1916, April 18, 1944	93
Report of Committee on Fare Structures of American Transit Association	30, 52
Supplement No. 2 dated May 20, 1943, to OPA Order 5C, 8 F. R. 6687	62

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

CITY OF JERSEY CITY AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE, FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR

OPINIONS BELOW

The opinion of the District Court (R. 194) is unreported. The two reports of the Commission which have been enjoined by the lower court are its reports of June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272) in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan R. Co.* Other

Commission reports involved are its decisions in the same proceeding dated July 11, 1938,[1] 227 I. C. C. 741 (R. 286), and August 3, 1943, 256 I. C. C. 269 (R. 313).

JURISDICTION

The final decree of the District Court was entered on January 14, 1944 (R. 218). Petition for appeal was filed February 9, 1944 (R. 220), and was allowed the same day (R. 234). Probable jurisdiction was noted on April 3, 1944 (R. 433). Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C., sections 45, 47a.

STATUTES INVOLVED

Pertinent provisions of the statutes involved are set forth in an appendix at the end of this brief.

COUNTER STATEMENT OF THE CASE[2]

The Statement of the Case in the brief of appellant Hudson & Manhattan Railroad Company

[1] Sustained by this Court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98.

[2] We have printed a separate Appendix covering relevant portions of the transcript for September 28–29, 1943, relating to (1) restrictions upon scope of reopened hearings, (2) the "War Risk Reserve," and (3) token use,

is deficient in the following respects: (1) It fails to give an adequate historical perspective; (2) it ignores many of the pertinent facts and issues. For these reasons it seems proper to give a more adequate background for the discussion of the legal issues here involved.

The Hudson & Manhattan Railroad Company has been before the Interstate Commerce Commission on three separate occasions seeking rate increases for the sole purpose of obtaining revenue sufficient to meet the interest charges on its bonded indebtedness.

In 1920 the carrier sought to increase its interstate downtown and uptown fares, then 5 and 7 cents respectively, to 8 cents on both lines. The Commission authorized a 6-cent fare on the downtown line and a 10-cent fare on the uptown line (58 I. C. C. 270).

In 1937 the carrier sought to increase the downtown fare from 6 to 10 cents. The Commission found that, in view of existing competition, an 8-cent fare was as much as the traffic would bear (227 I. C. C. 741, R. 286). This order was challenged by the carrier in the courts, and was affirmed by the Supreme Court in 1941 (313 U. S. 98).

On June 27, 1942, the carrier filed a petition in the same proceeding as that initiated in 1937, al-

---

including most of the Report of the American Transit Association. References to Transcript between pages 2032 and 2475 will ordinarily be found in the Appendix.

leging that its revenues were still inadequate to meet its interest charges, that an increase in the downtown fare to 10 cents was imperative, that even such increase would still fall short of producing the required revenue, and that the competitive conditions which the Commission found to exist in 1938 no longer existed by reason of wartime conditions, thereby enabling the carrier to increase the fare above the normal competitive ceiling.[3]

Hearings were held in September 1942, when the record was closed. The carrier's operating and financial data were shown only to the end of August 1942. Prior to the entry of the Commission's order, traffic data (number of passengers and amount of passenger revenue) for the months of January and February 1943 were incorporated into the record by stipulation; but the record contains no information as to the carrier's income beyond August 1942.

An appearance was entered on behalf of the Price Administrator in the September proceedings but his representative took no active part in the hearing. After the passage of the Act of October 2, 1942, the Stabilization Director intervened and took an active part in all subsequent stages of the proceeding.

On June 8, 1943, the Commission found that an increase in the downtown fare from 8 to 9 cents was proper during the war emergency pe-

[3] R. 390–403.

riod; that such fare would enable the carrier to earn $2,404,502, somewhat less than its full interest requirements; that while the downtown fare of 10 cents as proposed would yield to respondent substantial additional revenue, with a resulting net income estimated at $2,564,144, or $23,090 more than the full interest requirements, such increase in the downtown fare was not justified because

> * * * we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the interline traffic.[4]

The Commission limited the authorized 9-cent fare to the remaining period of the war and six months thereafter. The Commission also stated:

> It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing. (Order of June 8, 1943, 255 I. C. C. 649.)[5]

[4] R. 270.
[5] R. 248–272.

On July 8, 1943, the carrier filed a petition for modification of the foregoing order, alleging that its fare boxes were incapable of receiving the large number of coins required during rush hours under a 9-cent fare, and requesting that the cash downtown fare be fixed at 10 cents with an alternative token fare on the basis of eleven tokens for a dollar, at the same time offering to apply the token arrangement on its uptown line as well. The carrier represented that in over-all effect this substituted arrangement would not increase the carrier's revenues above those realizable under the June 8 order, but would produce a somewhat less amount.[6]

An order authorizing the substitute token arrangement was issued by the Commission on August 3, 1943 (256 I. C. C. 269).[7] The protestant Jersey City filed a suit in the United States District Court for the District of New Jersey challenging the validity of the August 3 order as having been entered without opportunity for a full and fair hearing of the issues presented therein,[8] whereupon the Commission ordered:

> That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the *propriety and lawfulness* of the modifications made by the Commission in its report

[6] R. 327–345.
[7] R. 313–327.
[8] R. 1–19.

> of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943; * * ** [Italics supplied.]

The reopened hearing was held on September 28–29, 1943, and the testimony therein was strictly limited by the examiner to the issues (1) whether it was feasible for the carrier to collect the 9-cent downtown fare and (2) whether the token arrangement as proposed would in overall effect produce more or less than the revenue realizable under the June 8 order.[10] At the reopened hearing the protestants offered to prove that the carrier, under the existing schedule of fares, was earning what the Commission had estimated the 9-cent fare would yield and that the entire basis for the proposed fare increase was removed by the growth of the carrier's business due to wartime conditions. Such evidence was excluded.[11] The Director then filed a motion to broaden the scope of the reopened hearing so that such evidence might be received. On November 2, 1943, the Commission denied this motion and entered an order authorizing the substituted token arrangement as proposed by the carrier (256 I. C. C. 507).[12]

The protestant Jersey City thereupon filed an amended complaint in the District Court challeng-

[10] R. 351.
[11] Tr. 2035, 2145–2150.
[12] Tr. 2149–2150, 2449–2450.
[13] R. 272–285.

ing the validity of the June 8 and November 2 orders,[13] and the Director by the Price Administrator, intervened in the court proceedings.[14]

Among the grounds for the challenge of said orders were:

(1) The plaintiffs were denied a full and fair hearing in that the Commission refused to receive evidence which, if true, would destroy the basis for any rate increase whatever.

(2) The Commission failed to give proper weight to the government's wartime stabilization policy, under which prices, wages and salaries are sought to be held to the level of September 15, 1942. It was alleged that, since the carrier is profiting greatly by reason of wartime conditions and since its fares are already at the highest level compatible with normal competitive conditions, it would be a violation of the government's stabilization policy and also contrary to sound principles of rate making to authorize a fare increase merely because the carrier's competition is curtailed by wartime restrictions and the carrier could take advantage of such wartime conditions without a disproportionate loss in volume of traffic.

(3) The Commission erroneously assumed that the carrier was entitled to meet its excessive interest charges out of revenues from the railroad operations.

---

[13] R. 25–54.

[14] R. 55–66.

(4) The Commission erroneously assumed that an accrual by the carrier of $240,000 a year to its "War Damage Reserve" was properly chargeable to operating expense in computing the allowable return.

(5) The Commission erroneously held that a deficiency in system revenue, even if properly found to exist, might be met by increasing the fare on the downtown line, which has always been the most profitable operation conducted by the carrier, and which under the existing fare has borne far in excess of its allocable share of the total system burden. (In this connection the record was replete with testimony both that the downtown line has produced a large part of the income available for bond interest, [15] and also that the carrier's divisions of joint fares arising out of the interline traffic with Pennsylvania Railroad have been grossly inadequate.)[16]

(6) The Commission erroneously held that an increase in the downtown fare, otherwise found improper, might be justified because of the inadequacy of the carrier's fare collection boxes and by a compensating decrease in the uptown fare.

(7) The Commission erroneously found, on the basis of self-serving opinions expressed by the carrier's officers without factual support,[17] and

[15] Tr. 1177–1182, 1399–1400, 1532, 1994.
[16] Tr. 1053, 1426–1427, 1640–1643, 1923.
[17] Tr. 2071–2073, 2125–2132, 2222–2223.

against all the factual evidence in the case,[18] that the substituted token arrangement would not yield a greater over-all return than the revenues realizable under the June 8 order.

The District Court found it unnecessary to pass upon all the foregoing allegations of error. It found that the Commission failed to give plaintiffs Jersey City and the Stabilization Director a full and fair hearing, and also that the Commission "lightly brushed aside" the national stabilization policy, without giving it the weight and effect to which it is entitled.[19] The challenged orders were permanently enjoined,[20] and the defendants below, Interstate Commerce Commission and Hudson & Manhattan Railroad Company, are prosecuting this appeal.

The following data will, we believe, assist the Court in appraising the issues:

Brief Description of Hudson & Manhattan Railroad

The Hudson & Manhattan Railroad is an underground electric railway providing frequent and speedy service through tunnels under the Hudson River to passengers traveling between Hoboken and Jersey City, New Jersey, and New York City. There are two lines, an uptown line from Hoboken to 33rd Street, New York, and a downtown line

[18] Tr. 2422–2445.
[19] R. 194–201.
[20] R. 218–220.

from Journal Square, Jersey City, through Grove Street and Exchange Place, then under the Hudson River to the Hudson Terminal at Cortlandt Street in lower Manhattan. A tie line connects the uptown and the downtown lines. The total length of all lines is only 8½ miles. The lines are double tracked. There are two parallel tubes under the river for the uptown line and two parallel tubes under the river for the downtown line. The cars have seating capacity for 44 passengers and are somewhat smaller than the New York subway cars. The tunnels are not large enough to accommodate standard size cars. The average length of ride on the downtown line is 2.26 miles; on the uptown town line, 4.24 miles.

The trains are run west of Journal Square to Newark over the line of the Pennsylvania Railroad Company; and there is an intimate interconnection of traffic between the two carriers, with arrangements relating to division of expenses, fares, and other matters of joint interest.

Construction work on the Hudson & Manhattan began prior to 1902. These early attempts resulted in failure and the enterprise went through several reorganizations. The work was finally completed by Hudson Companies, a construction corporation organized in 1905 for that purpose. Operations began on the uptown line in 1908, on the downtown line in 1909. Certain extensions were made in 1910, at which time the system was completed substantially as it now exists.

585280—44——2

In addition to its carrier facilities, Hudson & Manhattan owns two twenty-two story office buildings which it erected over its large underground station at Hudson Terminal.[21]

Cost and Capitalization

In the 1920 rate case the Commission found the original cost of the company properties to be approximately $60,000,000, of which $51,000,000 was allocated to the cost of carrier properties and $9,000,000 to the cost of non-carrier properties.[22]

In 1938 the Commission found the original cost of the railroad properties to be $66,543,281.07.[23]

On January 1, 1913, the Company had outstanding first mortgage 4½-percent bonds in the principal amount of $67,148,000. Under a readjustment plan then formulated, the bondholders were invited to surrender the original bonds and to accept in exchange 5% first lien refunding bonds to the amount of half of the old bonds held by them and 5 percent adjustment income mortgage bonds for the remaining half. Old bonds to the principal amount of $66,204,000 were exchanged on this basis. Interest on the income bonds was to be paid only if earned and did not become cumulative until January 1, 1920.[24] All the bonds will mature in 1957. It was only because of this

[21] 58 I. C. C. 270, 274; 227 I. C. C. 741, 744; R. 286, 290.
[22] 58 I. C. C. 270, 279.
[23] 227 I. C. C. 741, 750; R. 296.
[24] 58 I. C. C. 270, 275.

debt readjustment plan in 1913 that the Company has kept out of bankruptcy since that time, and has been able to continue operations under its unsound capital structure.

In addition to the bonded indebtedness, the Company has outstanding a large amount of common and preferred stocks. In its 1920 opinion the Commission stated that

> Most of the stock was distributed as a bonus with bonds, and a large part of it is now held by the Hudson Companies. No dividends have ever been paid on the stock and respondent states that it is not seeking additional revenue for the purpose of paying dividends on the stock, but only to provide payment of interest on its funded debt.[25]

At the end of 1919 the securities outstanding or about to be issued totaled $124,860,274, of which $79,623,233 was funded debt and $45,237,041 stock. Using a ratio of 83 percent to railroad property and 17 percent to nonrailroad property, the Commission then allocated $67,679,748 of the funded debt and $38,451,485 of the stock to the railroad properties.[26]

In 1938 the Commission allocated the Company's outstanding securities between its railroad and nonrailroad operations on the basis of 83.16 percent to railroad operations and 16.84 percent

[25] 58 I. C. C. 270, 275–276.

[26] 58 I. C. C. 270, 275; 255 I. C. C. 649; R. 252.

to nonrailroad operations. On this basis, $56,108,550.96 of the funded debt was allocated to railroad operations."[27]

At the end of August 1942, the capital securities allocable to the railroad properties on the basis of the 83.16 percent ratio were as follows:

Funded Debt:		
First mortgage 4½% bonds	$783,520	
First lien and refunding 5% bonds	26,572,948	
Adjusted income 5% bonds	23,542,950	
		$50,899,418
Capital Stock		37,557,459
Total Securities Allocable to Railroad Properties		[1] 88,456,877

[1] 255 I. C. C. 649; R. 251.

The aggregate annual interest charges on the above debt amounted at August 31, 1942, to $2,541,053.30. The principal indebtedness is being steadily reduced by the purchase of bonds in the open market.

Payments of Interest and Dividends

The company paid interest on its original 4½% bonds until January 1, 1913, and thereafter on the 5% first lien and refunding bonds issued in readjustment. However, on the income bonds then issued, the company paid an average of less than 1% a year to June 30, 1920 (58 I. C. C. 270). After World War I, the company's affairs took a sharp turn for the better. During the period 1923–1933 inclusive the company paid an aggre-

[27] 227 I. C. C. 741, 745; R. 290.

gate of $2,751,444.73 dividends on the preferred stock, and during the period 1925 to 1932 inclusive the company paid $8,651,051.10 dividends on the common stock—a total of $11,402,495.83. Since dividends could be paid only if there were no interest arrearages on the income bonds, such interest was necessarily paid for the period 1920–1932 inclusive. No dividends were paid prior to 1923; none have been paid since 1933 (255 I. C. C. 649; R. 253). The company's record since then follows:

1933 $302,406 Deficiency in income available for full interest on income bonds.

1934 $279,078 Deficiency in income available for full interest on income bonds.

1935 $487,289 Deficiency in income available for full interest on income bonds.

1936 $394,810 Deficiency in income available for full interest on income bonds.

1937 $655,164 Deficiency in income available for full interest on income bonds.

At the end of 1937 the accumulated deficiency was $1,642,410 (227 I. C. C. 741).

1938 $1,113,350 Deficiency in income available for full interest on income bonds.

1939 $806,048 Deficiency in income available for full interest on income bonds.

1940 $817,424 Deficiency in income available for full interest on income bonds.

1941 $892,148 Deficiency in income available for full interest on income bonds.

Accumulated deficiency as of December 31, 1941, was $5,494,727 (255 I. C. C. 649, R. 251).

1942 The company failed to show what, if any, deficiency resulted in 1942.

1943 Protestants offered to prove that during 1943 the carrier earned full interest requirements on its income bonds (Tr. 2149–2150, 2449–2450).

Fair Value as a Basis for Computation of Just and Reasonable Return

In its 1938 order, the Commission states:

> In behalf of respondent, a civil engineer with many years of experience in tunnel, subway, and other heavy construction, estimated the reproduction cost of respondent's railroad properties new on the basis of 1914 prices less depreciation, at $68,272,998.96. Prices in 1914 were used as representing a fairly stable level for an extended period prior thereto. The details on which this estimate was made are of record and have met with little criticism. The depreciated cost of reproduction new at current prices would be greater than the above estimate at 1914 prices. This estimate is offered in confirmation of the original construction cost of $66,543,281.07 shown by respondent, not only as a prudent investment, but as the actual cost of construction.[28]

In the 1942 hearing the Company's cost figures were extended down to August 31, 1942, at which time the cost of the railroad properties less retirements were shown to be $66,541,352. As the Commission itself states: "The original cost less depreciation does not appear."[29]

The record does not show any segregation of investment as between the uptown and downtown lines. However, in view of the fact that the up-

[28] 227 I. C. C. 741, R. 297.

[29] 255 I. C. C. 649, R. 252.

town line is much longer than the downtown line, and has seven stations in the City of New York, whereas the downtown line has only one station in New York, and in view of the further fact that the tunnels, roadways and equipment of the two lines are in other respects similar, it seems obvious that the investment in the uptown line is considerably larger than that in the downtown line.

Fares

On the uptown line the fare was 5 cents until December 1911, when it was increased to 7 cents; On April 18, 1920, the fare was increased from 7 to 10 cents, where it has since remained. Minimum rides under the 10-cent fare are 1.91 miles; maximum, 5.71 miles; average 4.24 miles.[30]

On the downtown line the fare was 5 cents until April 18, 1920, when it was increased to 6 cents; on July 25, 1938, it was increased from 6 to 8 cents where it has since remained. Minimum rides under the 8-cent fare are 1.25 miles; maximum, 3.2 miles; average 2.26 miles.[31]

Local intrastate fares between stations in New Jersey and between stations on the uptown line in New York are 5 cents. Maximum rides under the 5-cent fare are 2.28 miles in New Jersey, 1.52 miles in New York.[32]

---

[30] 58 I. C. C. 271, 276.

[31] 58 I. C. C. 271, 276; 227 I. C. C. 741; R. 249.

[32] 58 I. C. C. 271.

In its 1938 order, the Commission found that, because of competitive conditions, the 8-cent downtown fare had reached the economic limit.[33]

Downtown v. *Uptown Line*

In its 1920 and 1938 rate orders the Commission recognized that the fare on the downtown line should be less than that on the uptown line.[34] The average distance traveled by passengers is 2.26 miles on the downtown line, and 4.24 miles on the uptown line. The running time on the downtown line is 6.4 minutes; on the uptown line, 16.2 minutes. At the 1942 hearing it was shown that the cost per passenger on the downtown line is 5.16 cents; on the uptown line, 9.73 cents.[35] The downtown line carries more than twice as many passengers as the uptown line. The downtown trains, particularly during the four peak hours, are excessively crowded, as many as one hundred or more passengers being carried in cars with a seating capacity of forty-four; while the uptown cars are much less crowded and the passengers suffer much less inconvenience.[36] As above noted, the investment in the uptown line (although no segregation of cost has ever been made) is considerably more than the investment in the downtown line.

[33] 227 I. C. C. 741, R. 310.
[34] 58 I. C. C. 270, 278, 280; 227 I. C. C. 741, R. 302.
[35] Tr. 1994.
[36] Tr. 2076, 2079.

The Company's financial needs have resulted largely from loss of traffic on the uptown line, due to the railroad ferries, the opening of the Holland Tunnel in 1927, the George Washington Bridge in 1931, the Lincoln Tunnel in 1937, and the consequent increase in the competition of busses and private automobiles, which have particularly affected the traffic on the uptown line. The record indicates that the number of busses crossing the Hudson River increased from about 70,000 in 1925 to 1,112,000 in 1937; and that the number of private automobiles crossing the Hudson River increased from about 7,000,000 in 1924 to 25,811,000 in 1937."

In 1941 the downtown line produced net revenue available for bond interest in the amount of $1,707,000, as against an operating deficit on the uptown line.[88] For many years the receipts from the uptown line have yielded little more than out-of-pocket operating expenses. In its 1938 opinion the Commission considered the problem whether the Company would be better off if the uptown line were abandoned. On this point the Commission said:

> Because the fundamental cause of the respondent's lack of income is the decline in traffic, especially on the uptown line, it has made a study to determine whether that line has now reached the point where

[87] 227 I. C. C. 741; R. 294.

[88] Tr. 1994.

it has become a burden upon the road as a whole. Income and expenses, including taxes allocable to railroad operations, were divided between the uptown and downtown lines in 1937 on the basis of a formula of which there has been practically no criticism. The results indicate that in that year the downtown line contributed $1,845,747 and the uptown line $300,592 to net income available for bond interest; that if the uptown line had been abandoned and 50 percent of its traffic lost, and the remainder diverted to the downtown line, the balance available for bonded interest would have been approximately $336,388 less than it was, and if all of its traffic had been lost, the balance available for interest would have been about $817,492 less than the actual. This study indicates, therefore, that respondent would be worse off if the uptown line were eliminated."[39]

At the 1942 hearing, counsel for the carrier insisted that the uptown line had nothing to do with the case, that only the downtown line was involved, and that it was proper to require the downtown line to make up the deficiency in system earnings by a further increase in the downtown fare."[40]

Divisions

Since the outset of its operations, Hudson & Manhattan has had an arrangement with the

[39] 227 I. C. C. 741, R. 295-296.
[40] Tr. 1824, 1937.

Pennsylvania Railroad Company for the joint transportation of passengers between Newark, New Jersey, and New York City, with an agreed division of operating expenses and joint fares. Since September 1, 1923, Pennsylvania has paid Hudson & Manhattan 8.64 cents per passenger transported from New York to Newark on the uptown line, and 7.64 cents per passenger transported to Newark on the downtown line. Pennsylvania owns the right-of-way and trackage between Journal Square and Newark."

There is an intimate interchange of facilities between the two carriers. Pennsylvania has ticket agents and collectors at Hudson & Manhattan's New York stations. The division of joint fares was based on the ratio of mileage over the tracks of Hudson & Manhattan and Pennsylvania, respectively, although, as the Commission points out in its 1938 order, Hudson & Manhattan's investment was about $8,000,000 per mile as compared with a much smaller proportionate investment by Pennsylvania in its Newark line and an average investment of $112,000 per mile by all class I American railroads. Pennsylvania's part of the joint line is above ground while practically all of Hudson & Manhattan's trackage is underground, including its tunnels under the Hudson River. Evidence was presented at the 1937–1938 hearings indicating that

---

[1] 58 I. C. C. 270, 276; 227 I. C. C. 741; R. 302–305; R. 261–264.

the cost of terminating or originating a passenger in the Pennsylvania's 33rd Street Station is about 84.8 cents exclusive of the cost of operating the trains, and that Hudson & Manhattan performs a very valuable terminal service for Pennsylvania which justifies a much larger division of the joint fare.[42]

The fare between New York and Newark on the Pennsylvania line varies with the type of ticket from 44 cents for a round trip ticket to 12.4 cents per permissive ride on a 60-trip monthly ticket.[43]

Jersey City and other protestants have long contended that Hudson & Manhattan should have a much larger division of the joint fares. The record indicates that, although Pennsylvania is now receiving a 10 percent increase in its fares between New York and Newark as authorized in Ex Parte 148, none of this increase is being shared by Hudson & Manhattan; and that although Hudson & Manhattan's operating expenses have been greatly increased, its divisions have not increased since 1923; also that the joint traffic does not make its fair contribution toward meeting Hudson & Manhattan's revenue needs.[44]

In allowing the increase in the downtown fares from 6 to 8 cents in 1938 the Commission stated that

---

[42] R. 304.

[43] 255 I. C. C. 649; R. 263, 305.

[44] Tr. 1053, 1399, 1426–1427, 1640–1643; R. 270.

> If respondent should feel impelled to seek a further increase in revenue it should consider doing so on interline traffic.[45]

The present record indicates that the carrier has not heeded the foregoing admonition, but has stood resolute in its determination to raise the downtown fare to 10 cents before seeking to obtain any increase in the division from Pennsylvania.[46] In its order of June 8, 1943, the Commission referred again to the divisions problem. After reviewing the testimony at some length, the Commission concluded that the carrier's revenue needs could not be fully met by an increase in its divisions of joint fares, stating:

> If no more than the 10 percent increase as made in the joint fares were reflected in the divisions to respondent, its revenues wou'd be increased by about $150,000 a year. * * * it would seem that under normal circumstances the saturation point in increased fares on that traffic (downtown line) has about been reached. While there can be little doubt that under present conditions a further increase in this fare, even to 10 cents would result in additional net revenue, we are convinced that it would be unreasonable to expect the entire burden of the revenue increase to be borne by the downtown local passengers, and that a substantial portion thereof should be sought through increased divisions in the inter-

[45] 227 I. C. C. 741, 762; R. 311.

[46] Tr. 1126, 1270–1273, 2026, 2107, 2111.

line traffic. This view is strengthened by the fact that in August 1942, for example, the interline traffic increased 33.1 percent as compared with an increase of only 9 percent in the downtown local traffic and of 15.9 percent in respondent's total traffic."[47]

Volume of Traffic

The record indicates that Hudson & Manhattan has an annual carrying capacity far in excess of the number of passengers which it has ever carried in any year. It was suggested in the record that the carrier would haul 200,000,000 passengers a year if reasonably distributed throughout the 24-hour day.

During the first year of operation—1908—the Company carried 10,585,000 passengers. This number grew to 58,079,000 in 1912, to 94,102,461 in 1919, to a peak of 113,141,729 in 1927.

Between the years 1927 and 1941 the traffic gradually declined. The total number of passengers in 1937 was 77,989,857 and in 1941, 65,847,289.[48]

Since the outbreak of the war, however, there has been a tremendous increase in the volume of traffic. When Hudson & Manhattan filed its petition on June 27, 1942, seeking to increase its downtown fare to 10 cents, it stated that it could not

[47] 255 I. C. C. 649; R. 264, 270.

[48] Traffic figures are obtained from the Commission's 1920, 1938 and 1943 rate orders.

meet its increased operating expenses and interest requirements under existing fares without a 20 percent increase in traffic over 1941, and that even with a 10-cent fare it would be unable to meet its revenue needs.[49] It then considered that an increase in traffic of 30 percent was out of the question;[50] but before the record was closed and the final order of the Commission issued, the protestants were prepared to show that the traffic had increased by 30 percent and was yielding an income adequate to meet all the financial needs which the carrier had portrayed in its original petition.[51] While the effect of the increased traffic upon its revenue requirements was not allowed to be placed on record, the carrier itself admitted, on the basis of traffic for the first eight months of 1943, that it would carry 83,500,000 passengers during that year—or an increase of about 27% over 1941.[52]

One of the chief considerations in the various proposals for increase in fares of Hudson & Manhattan has been the effect of fare increases upon the volume of traffic. The 1920 fare increases resulted in 11 percent diversion of traffic; the 1938 fare increase resulted in 16.5 percent diversion. Much testimony was heard at the 1942 hearing on

[49] This estimate was based on the assumption that there would be no increase in wages, taxes, or unit costs of materials (R. 399).

[50] Tr. 1196, 1283, 1935–1936, 1949, 2024.

[51] For protestants' offer of proof, see Tr. 2149–2150, 2449–2450.

[52] Tr. 2214.

the diversion which would result from an increase in the downtown fare to 10 cents, estimates ranging from 12 percent to 25 percent or more.[53] However, in view of the war conditions and the greatly accelerated volume of traffic, the carrier's president was of the opinion near the close of the hearings that the threat of diversion is now eliminated by the drastic curtailment of bus and automobile travel, and that substantially no diversion would result under present war conditions.[54]

Reserves To Defray Capital Expenditures

In its 1920 order the Commission stated:

> In 1917, 1918, and 1919 appropriations to a reserve for contingencies of $685,000, $660,000, and $640,000 respectively were made, and the total reserve on December 31, 1919, was $2,375,000, practically all of which had been used for capital expenditures. If these amounts had been applied to interest payments on the income bonds, 2 percent could have been paid in 1917, 2 percent in 1918, and 2½ percent in 1919, and for the full year 1916 .3 percent could have been paid. (58 I. C. C. 270, 279.)

The carrier has been accumulating a similar reserve during the present war under the designation of "War Risk Reserve." Early after the outbreak of the present war, the Company began to accrue $20,000 a month to this reserve, and such

[53] Tr. 1219, 1608–9, 1711, 1921, 1944.

[54] Tr. 1946, 2055, 2135.

accrual has been charged as an operating expense. The record indicates that not one cent has been expended to defray any war damage; that all wages and other items of expenses have been cared for in normal course; and that the accumulations to this Reserve have been used, along with accumulations to the carrier's depreciation reserve, as an amortization fund for purchasing in the open market the company's outstanding and greatly depreciated bonds.[55]

Counsel for Jersey City attempted to show on cross-examination that the Company was purchasing its income bonds in the open market at a price around 28 cents on the dollar, and that in seeking to obtain interest at the rate of 5 percent on par value, the Company is in effect seeking to recover from the ratepayers revenues amounting to more than 15 percent on the market price of these bonds.[56]

Between January 1, 1919, and August 31, 1942, the Company retired $16,780,330 of its funded debt allocable to railroad operations, of which $7,238,000 was retired during the last six years of said period. These bonds were retired at greatly depreciated prices out of funds which the carrier accrued to various reserves under the guise of operating expenses. The President testified that in 1933 he began a vigorous policy of debt retire-

[55] Tr. 1264, 1315–9, 1833–7, 2144, 2151, 2216–8.
[56] Tr. 2222.

ment, which he has pursued to the present date; and he stated that the program of debt reduction since 1933 "has been our salvation".[57]

Carrier's Revenue Needs

In filing its petition and presenting its testimony in this proceeding, the carrier assumed that it was entitled to recover its revenue needs, including not only its operating expenses, but also the full interest on all of its outstanding bonds and the full amount of its so-called "War Risk Reserve," which it characterized as a proper operating expense.

At no time did the carrier undertake to prove that it is reasonable that the passengers should now provide funds for the payment of interest at the rate of 5 percent on more than $50,000,000 of bonds; or the relationship of the amount of these bonds to the present fair value of the railroad property; or the relationship of the interest rate of 5 percent to a reasonable rate of return on the fair value of the property used in the public service; or any other fact tending to show that its claimed revenue needs are just and proper.

The protestants offered testimony indicating that the carrier has not been progressive; that it has failed to take advantage of opportunities to increase its revenues by using its facilities during off-peak hours for freight and express services;

[57] Tr. 1862.

that the Company can best hope to survive by lowering rather than by increasing its fares.[58]

Token Utilization

In connection with the reopened hearing in September 1943 one of the questions presented was whether the carrier's over-all earnings would be increased or decreased, as compared with earnings under the order of June 8, by the alternative token arrangement. Such inquiry was significant in view of the fact that the carrier represented that it was seeking no further increase in revenue, but only a feasible method of realizing the increased earnings anticipated under the June 8 order.

Protestants took the legal position that no increase in fare can be justified merely because the company's old[59] fare boxes are unable during peak hours automatically to count without danger of congestion the numerous coins required in payment of a 9-cent fare; also that an increase in the downtown fare, already at the highest level compatible with the standards of the Interstate Commerce Act according to the Commission's own finding in its order of June 8, could not be justified by a compensating decrease in the uptown fare.

[58] See, for example, testimony of T. W. VanMetre, Professor of Transportation in Columbia University, Tr. 1480–1539.

[59] Installed in March 1918 (Tr. 2232).

But protestants also undertook to meet the carrier with testimony, based on the experience of the entire industry, that the alternative token arrangement would result in increase of the carrier's overall earnings. Such result would necessarily follow if more than 26 percent of the riders should pay the cash fare of 10 cents rather than purchase tokens at 11 for one dollar. On the basis of the only authoritative study on the subject, published by the American Transit Association in 1937,[60] the protestants showed that, because of the small discount offered and the large amount required to be invested in tokens, only about 34 percent of the riders might be expected to use tokens and 66 percent of the riders might be expected to pay the 10-cent cash fare. Telegraphic test check indicated that the experience of the companies using tokens is now substantially the same as it was in 1937.[61] Against evidence to the contrary covering the experience of the entire industry over a long period of years, the Commission accepted as "within the range of probable achievement under the proposed fare basis" the self-serving and unsupported opinion of the Company's officers that 90 percent of all riders would use tokens.[62] This opinion of the management was based on the further opinion

[60] Report of Committee on Fare Structures of American Transit Association, Exhibit F-142 (Appendix to Brief, 47).

[61] Tr. 2431-2434, Ex. F-154.

[62] R. 281-2; Tr. 2072-3, 2158, 2200.

that 100 percent of the regular riders would use tokens, and that only the 10-percent occasional riders would pay the cash fare.[63] The carrier's president further testified that, in estimating a token utilization of 90 percent, he took into consideration "the fare consciousness of Jersey City" and the opinions of witnesses for Jersey City that an increase in the downtown fare from 8 to 9 cents would result in a traffic diversion of 25 percent or more;[64] although he himself testified that in the opinion of the management the fare increase would cause substantially no diversion.[65]

The Commission thereupon authorized the alternative token arrangement, under which the cash fare on the downtown line would become 10 cents—an increase of 66⅔ percent over the cash fare prior to July 25, 1938, and an increase of 25% over the existing cash fare.

QUESTIONS PRESENTED

1. Did the District Court err in holding that the Commission failed to grant to the Director a full and fair hearing on the question whether the 8-cent fare on the Hudson & Manhattan Railroad Company's downtown line should be raised to the alternative-fare basis of 11 tokens for $1.00 or a cash fare of 10 cents?

---

[63] Tr. 2073.
[64] Tr. 2162–3.
[65] Tr. 2055.

2. Was the Commission's action in finding the above increased fare just and reasonable under the Interstate Commerce Act arbitrary and unreasonable because unsupported by substantial evidence and, as the District Court held, because taken without due consideration and effect being given to the wartime stabilization policy?

SUMMARY OF ARGUMENT

A

The Economic Stabilization Director, represented by the Price Administrator, was authorized to intervene in the proceedings before the Commission which are subject to review in this case. He acts pursuant to the mandate of Congress to the President in the Stabilization Act of October 2, 1942, to defend the national interest in economic stabilization against the inflationary danger which would result from increases in the level of common carrier and other public utility rates. He asserts no rights or powers superior to the Commission's.

As the District Court below properly held, the Director adequately pursued the administrative remedies given to him and took no position inconsistent with that for which he now contends.

B

The hearing which, after its June 8, 1943, order, the Commission reopened to consider the company's petition for an alternative-fare basis of

11 tokens for a dollar or a 10-cent cash fare was a proceeding to consider not merely a mechanical correction of a prior determination, but an increase in fare above the level previously authorized by the Commission. Hence the Commission's action in narrowing the scope of the reopened hearing to exclude inquiry into the lawfulness and propriety of the rate increase was an arbitrary and unreasonable refusal to grant a full and fair hearing.

The Commission's obligation to grant a full hearing as to the lawfulness and propriety of the higher alternative-fare basis could not be evaded on the theory that, because the higher alternative fare could not be "expected to yield materially better revenue results" to the carrier than the Commission "anticipated at the time of" the June 8th order, it was merely a mechanical correction of the June 8th order. Moreover, the Commission's assumption that the alternative-fare basis would not yield materially higher revenues to the carrier was contrary to the only reliable or probative evidence of record on the use of tokens, despite the Commission's Procrustean effort to stretch that evidence to sustain its erroneous conclusion that the "90–10 percent use ratio * * * appears to us to be within the range of probable achievement under the proposed fare basis."

C

The Commission acted arbitrarily in rejecting the testimony offered by the Director at the reopened hearing, which, by bringing the rapidly changing wartime conditions down to a reasonably proximate period, would have shown that no fare increase was required since, without any fare increase, the company's income had risen to substantially the level which the company had set as its goal when it initiated the proceeding in June 1942, and which the Commission in its June 8th, 1943, order had found necessary to insure adequate transportation service.

The record on which the Commission's order of November 2, 1943, was based contained no accurate data as to the company's income for a period of 14 months prior to the order's effective date. This staleness was especially serious in view of the importance to effective stabilization that determinations as to rate and fare increases be based upon current data.

Furthermore, the importance of a fresh record to the establishment of just and reasonable fares in this proceeding was rendered critical by the special circumstances of the case, namely, that the proceeding was initiated on the basis of changing conditions and revenue needs, and that the Commission's June 8th order not only was based on a calculation of revenues to be obtained under

changed conditions but also declared the Commission's willingness to modify its order whenever a further change of conditions should render the revenue results to the carrier "materially different" from those estimated.

The holding of this Court in *Vinson* v. *Washington Gas Light Co.* does not support the company's contention that the Director had no "standing before the Commission entitling him to tender" evidence of the company's wartime income. Nor is there justification for the company's denial of the relevance of that evidence on the ground that *the Director* had not shown that the existing fare would yield a fair return on fair value, an issue first raised in this appeal.

D

The Commission's orders were unlawful under Sections 1 and 15a (2) of the Interstate Commerce Act, properly construed and applied in the light of wartime economic conditions and governmental controls. Even though the proviso to Section 1 of the Stabilization Act imposes no limitation on the Commission's authority under the Interstate Commerce Act, nevertheless, the Commission was obligated, in applying the standards prescribed by its own Act, to give consideration and effect to wartime conditions and the stabilization program. However, its approach to the problem of thus applying its standards was

vitiated by its erroneous assumption that, because the amount of the fare increase it authorized was small in absolute terms, the effects of its action from the standpoint of stabilization would be negligible.

On the record before the Commission, it could not justifiably conclude that the increased fare which it authorized was "the lowest cost consistent with the furnishing" of "adequate and efficient transportation service" or that it was necessary to meet "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." Indeed, an analysis of the Commission's own estimates of the effect of the increase showed that the company was in no need of the increase, especially in view of its creation of a "War Risk Reserve" and its persistent failure to seek more equitable divisions of joint fares.

Evaluated from the standpoint of its impact on investors and users, the Commission's action in increasing the fares on the downtown line was unwarranted and inconsistent with the national stabilization policy. Investors in the company's securities were amply rewarded by the return yielded in wartime by the 8-cent fare. On the other hand, the users of the downtown line, always the profitable portion of the company's system, were being called upon to sustain the second increase in fares in six years, raising the level of

fares by more than 50 percent despite the fact that during approximately the same period the index of streetcar and bus fares for the nation was almost stationary.

This Court, examining the problem as a question not merely of the review of administrative action but of the effectuation of complementary Congressional policies, should affirm the decision of the District Court restraining the increase as unjust and unreasonable.

ARGUMENT

A. THE ECONOMIC STABILIZATION DIRECTOR WAS LEGALLY AUTHORIZED TO INTERVENE, IN DEFENSE OF A LEGALLY RECOGNIZED INTEREST, TO CHALLENGE THE COMMISSION'S ORDER AND WAS SUBJECT TO NO PROCEDURAL DISABILITIES IN SO DOING

1. *The Director, having been designated by the President pursuant to Section 1 of the Stabilization Act, is charged with the duty of intervening in rate increase proceedings to protest increases where, as here, the increase is contrary to the interests of the wartime stabilization program*

The Director's participation in the present proceeding was under the notice and intervention provision of the Act of October 2. He intervened through the Price Administrator, the Director's designated representative, for the purpose of opposing increases in fares believed to be contrary to both the Interstate Commerce Act and the national program to keep down the cost of living. In the words of Congressman Wolcott, his inter-

vention under the Act was pursuant to the Congressional purpose of "allowing the Price Administrator, or anyone else who the President designates, to intervene to protect the public interest * * *"[∞]

The substantial character of his interest in utility and common carrier rates is indicated by the fact that the total annual payments for utility and common carrier services exceed $12 billion.

The level of transportation rates and other utility charges is, of course, a factor of consequence in the cost of military and naval supplies and the cost of war operations.

Many of the charges imposed affect the cost of living directly, as in the case of electric light rates and passenger fares and freight charges which comprise a part of the net cost of goods to which retailers add their margins. Still other of these charges constitute costs of manufacturing and distribution, increases in which, when combined with other cost increases, make for other pressures against price ceilings. Perhaps no form of rate increase, however, is of greater concern to the Director than increases in the fares charged for local transportation. Not only is the increase in the cost of living direct, but it is with reference to an expenditure as to which the public is peculiarly sensitive, as the long history

[∞] 88 Cong. Rec. p. 7740.

of municipal political strife on transit issues demonstrates.

Here the proposed increase directly affects the cost of living of thousands of war workers. This fact was called to the Commission's attention as early as December 14, 1942, in our brief filed with the Examiner, where it was stated:

> In a vital defense area such as the New York-New Jersey area served by petitioner, where millions of defense workers are employed, adequate commutation facilities must be provided. And they must be made available at reasonable fares. Otherwise the cost of living of such workers will increase and may occasion demands for increases in wages and salaries. Thus is the spiral commenced which leads ultimately to disastrous inflation. That the proposed increased fare would result in a considerable increase in the cost of living of the commuting passengers has already been found by the Commission (227 I. C. C. 757–758).

In intervening in proceedings of this character, the Director's intervention has not been for the purpose of seeking "superior rights and powers" [67] to that of the Interstate Commerce Commission. Nor has it been for the purpose of "paralyzing or extinguishing local institutions." [68]

---

[67] *Cf. Vinson* v. *Washington Gas Light Co.*, — U. S. —, 64 S. Ct. 731 (1944).

[68] *Cf. Davies Warehouse Co.* v. *Bowles*, — U. S. —, 88 L. Ed. 379, 64 S. Ct. 474 (1944).

On the contrary his participation in common carrier and utility rate proceedings has been generally recognized as advantageous by regulatory commissions. Moreover, particularly in matters before the Interstate Commerce Commission, his entry or continued participation has been at the request of state commissions and municipalities in a number of cases.[69]

The Court should also note that under the Commission's procedure a very substantial burden

[69] Some of the proceedings in which the entry or continued participation of the Director or the Price Administrator has been upon the formal or informal request of state commissions or municipalities are the following:

Before the Interstate Commerce Commission: Case No. 28963, Alabama Intrastate Fares (Alabama Public Service Commission); Finance Docket 14257, Southern Railway Co. Abandonment of Attalla-Rome Line (Alabama Public Service Commission); Chicago Commutation Fare Cases (Illinois Commerce Commission); Case No. 29000, Kentucky Intrastate Fares (Kentucky Commission); Fares of Hudson & Manhattan Railroad Co. (City of Jersey City); New York Commutation Fare Case (New York Public Service Commission); Case No. 29036, North Carolina Intrastate Coach Fares (North Carolina Commission); Case No. 29037, Tennessee Intrastate Fares (Tennessee Commission).

Before State Commissions: *Illinois*—Chicago Rapid Transit Company, No. 29923 (City of Chicago); Illinois Central Telephone Company (City and Town of Washington, Illinois); Illinois Allied Telephone Company (City of Princeton, Illinois); Chicago Surface Lines (City of Chicago, Illinois); *Indiana*—Eastern Indiana Gas Company (City of Nashville, Indiana); *Michigan*—Detroit Edison Company (City of Detroit, Michigan); *Ohio*—East Ohio Gas Company (City of Cleveland, Ohio); Ohio Fuel Gas Company (Village of Malta, Ohio); *Pennsylvania*—Longacre Park Heating Company (Borough of Yeadon, Pennsylvania).

must be assumed by the Administrator for protection of the public interest. It is not the Commission's practice to suspend new rates in the absence of protest by a party. In many cases involving substantial increases in passenger and freight rates the Administrator is the only party protestant, a situation which is natural under wartime conditions when private litigants and public officials lack time to devote to the protection of their individual and community interests. Where the Commission suspends following the filing of the protest, the entire burden at the hearing of making out an adequate case in opposition to a request of the carrier for increases therefore falls upon the protestants. The Commission's own legal and technical staff, unlike that of the Federal Power Commission, does not actively participate on behalf of the public. Hence, the task of breaking down the case for an increase through cross examination and affirmative testimony is placed upon the Director and other agencies representing the public interest.

2. *The Court properly held the Director exhausted his administrative remedy*

The Company argues that this suit was prematurely filed on the theory that the Director's administrative remedies have not been exhausted. We submit there is no merit in this contention.

The Director in his answer of July 19, 1943,

to the July 8, 1943, request of the Railroad for the right to sell tokens in lieu of the 9-cent cash fare specifically requested the Commission to reconsider its order of June 8th. In this answer the Director stated:

> In view of Petitioner's tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order, and return Petitioner's downtown fares to the original level of 8 cents. This will serve the national program to keep down the cost of living.

The New Jersey protestants asked that the June 8 order be indefinitely suspended and the proceeding be set for further hearing (R. 350).

The Director's counsel at the reopened hearings stated that they opposed any increase over and above the 8-cent cash fare. In his petition for modification dated October 14, 1943, the Director specifically stated that the order of June 8, 1943, was contrary to the Stabilization Act (R. 67). The Commission in its order of November 2 declined to permit the introduction of evidence which would have brought the record down to date. It again reaffirmed its former findings. It mistakenly held that the new evidence, if available, would not change its earlier findings (R. 275).

These requests of the Director constituted a request for rehearing of the June 8 order. More-

over the Commission in its November 2 order permitted the Railroad to file and make effective the new tariffs on 15 days' notice (R. 284). With the filing of the tariffs the Commission took the view that it was without legal power to further suspend the tariffs. The tariffs could only be suspended by action of the Company. Further recourse to the Commission would have been useless.

The court below properly noted that no request for a rehearing is required under the Commission statutes or decisions of this Court, particularly *Baltimore and Ohio R. R.* v. *United States,* 298 U. S. 349, where the Court held:

> No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal, or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the Commission prescribing rates or divisions (p. 371).

3. *"Estoppel" cannot be invoked against the Director as a reason against injunction proceedings or to justify the Commission's refusal to receive evidence designed to show that the carrier was entitled to no increase over its present 8-cent fare*

Only the carrier in its brief, and not the Commission, has invoked the argument of "estoppel." While denying the validity of such "estoppel"

argument against Jersey City, we submit that it is totally inapplicable to the Director, who was in no way precluded by any direct or indirect action on his part from contesting any increase over the present 8-cent fare. Throughout the proceedings the Commission and carrier were apprised of the Director's opposition to such increase and were not misled or placed in doubt as to his position.

These protests were made:

1. In the Director's original brief filed with the Commission.

2. In his exceptions to the Examiner's proposed report wherein the Director excepted to any increase over the 8-cent fare.

3. In the Director's oral argument before the Commission on April 20, 1943 (Tr. 2009 et seq.), wherein his counsel stated that a fair and reasonable rate for the carrier is 8 cents.

4. In his reply of July 19, 1943, to the carrier's petition for reconsideration and modification of the Commission's order of June 8, 1943, and for a token fare structure, wherein he said:

> And in view of Petitioner's (carrier's) tremendously improved current earnings, it is requested that this Commission reconsider its previous modification of its original order (that is, its order of July 11, 1938), and return Petitioner's downtown fares to the original level of 8¢. This will serve the national program to keep down the cost of living.

5. As shown by his attempts to introduce evidence at the reopened hearings of September 28–29, 1943, as to the unwarranted nature of any increase over the 8-cent level (Tr. 2035, 2145, 2149, 2449).

6. In his brief filed October 14, 1943, in connection with the Commission's hearing of September 28–29, 1943, wherein *inter alia*, the inflationary nature of any increase over 8 cents was argued.

Certainly neither the Commission nor the carrier could under these circumstances reasonably be in doubt about the position of the Director. Nor is any weight to be given to the carrier's farfetched argument that perhaps an "estoppel" against Jersey City, based on the limited allegations in its original complaint, can be extended to the Director "by reason of his acceptance of the opportunity offered him by the Commission to participate in the further hearing" of September 28–29, 1943 (Carrier's brief p. 75). It is obvious that the Director, not being a party to the original complaint, could not be estopped by any action purportedly resulting from its allegations, especially in view of the fact, as noted above, that at the hearings of September 28–29, 1943, he made his opposition to any increase above 8 cents abundantly clear.

B. THE REOPENED HEARING TO CONSIDER THE COMPANY'S PETITION FOR AN ALTERNATIVE-FARE BASIS OF 11 TOKENS FOR A DOLLAR OR A 10-CENT CASH FARE WAS A PROCEEDING TO CONSIDER NOT A MERE MECHANICAL CORRECTION OF A PRIOR DETERMINATION, BUT AN INCREASE IN FARE ABOVE THE LEVEL PREVIOUSLY AUTHORIZED BY THE COMMISSION. HENCE THE COMMISSION'S ACTION IN NARROWING THE SCOPE OF THE REOPENED HEARING TO EXCLUDE INQUIRY INTO THE LAWFULNESS AND PROPRIETY OF THE FARE INCREASE WAS AN ARBITRARY AND UNREASONABLE REFUSAL TO GRANT A FULL AND FAIR HEARING

1. ***The Commission's obligation to grant a full hearing as to the lawfulness and propriety of the higher alternative-fare basis could not be evaded on the theory that, because the higher alternative-fare could not be "expected to yield materially better revenue results" to the carrier than the Commission "anticipated at the time of" the June 8th order, it was merely a mechanical correction of the June 8th order***

After the Commission's order of June 8, 1943, was changed by its August 3rd order so as to authorize the alternative-fare basis of 11 tokens for $1 or a 10-cent cash fare, Jersey City sued for an injunction because of the Commission's failure to grant a hearing to consider this further fare increase (euphemiously termed a "modification").[70] The Commission thereupon reopened the proceeding by an order expressed in the following terms:

> That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the pro-

[70] R. 1.

priety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; * * *."[11]

Although the order was susceptible of a construction which would have allowed a full inquiry into the "propriety and lawfulness" of the alternative-fare basis, the Commission's examiner restricted the inquiry to an inquest on what the higher fare would extract from the patrons of the downtown line as against what the lower fare would give to patrons of the uptown line."[12]

The reasoning of the Commission underlying its refusal to permit a full hearing with respect to the proposed alternative-fare basis seems to have been about as follows: (1) The 9-cent fare approved as just and reasonable in our June 8th report was calculated to produce revenue sufficient to meet the carrier's needs. (2) The 9-cent fare appears not practicable of collection. (3) The alternative-fare basis will yield approximately the same amount of revenue as we found the carrier needed in our June 8th report. (4) *Therefore,* without further hearing, we are now entitled to find the alternative fare to be just and reasonable.

The fourth link in this chain of reasoning is a clear *non sequitur.* A fare which produces

[11] R. 351.

[12] R. 2034–5. The 9-cent fare's practicability was also considered.

the same revenue as another fare which is just and reasonable is not by virtue of that fact itself just and reasonable. Indeed, it may produce the same revenue simply because it is *un*just and *un*reasonable, as where a sharply increased rate causes so much diversion of traffic as to produce no more revenue than a much lower antecedent rate. And here, where the assumed similarity in revenue is achieved by offsetting the increase of one fare by a reduction in another fare *on another line*, it is, of course, obvious that the increased fare must be separately justified. It is not enough to tell the users of the line where the fare has been increased that the users of the other line are enjoying lower fares as a consequence.

Once it had become apparent that a new fare must be established in lieu of the impracticable 9-cent fare, a range of possibilities was opened to the Commission. The alternative-fare basis proposed by the Company and adopted by the Commission was only one of these. Another alternative would be to return to the 8-cent fare. In between would be a number of combinations of token offers with a 9-cent or a 10-cent cash fare.

Obviously, in view of the nature of the original proceedings, an essential factor in deciding among these alternatives was the net revenue which each would yield under the then existing conditions, a factor distinct from the revenue which the Com-

mission had found in a previous hearing the impracticable fare would have yielded—if it had not been impracticable—under conditions which no longer existed.

The Commission failed to carry out its obligation to consider these other alternatives by making three arbitrary and unreasonable determinations:

(i) It grossly underestimated the amount of the fare increase the alternative fare basis imposed on the patrons of the downtown line by a flagrant disregard of the only reliable evidence of record. This error is discussed in point 2 below.

(ii) The Commission rejected evidence offered by the Director that the 8-cent fare was actually then yielding what the Commission had already found would be sufficient to meet the carrier's reasonable revenue needs. Hence the Commission's finding that the alternative-fare basis it approved was "the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings" in the June 8th report was not based on a hearing of the relevant available facts. This error will be developed further under heading C of our brief.

(iii) Without further evidence on the point, it disregarded its prior determinations that 10 cents was a reasonable maximum fare for the uptown

line and that a lower fare should be maintained on the downtown line in view of the differences in costs and service. Instead the Commission equalized the two fares on the alternative-fare basis by reducing the fare on the relatively unprofitable uptown line and increasing still further the fares on the profitable downtown line. This error will be developed further under heading D.

2. *Moreover, the Commission's assumption that the alternative-fare basis would not yield materially higher revenues to the carrier was contrary to the only reliable or probative evidence of record on the use of tokens, despite the Commission's Procrustean effort to stretch that evidence to sustain its erroneous conclusion that a "90–10 percent use ratio * * * appears to us to be within the range of probable achievement under the proposed fare basis"*

In its August 3rd order the Commission, without any independent investigation, accepted without qualification the affidavit of the company's president, Mr. Brown, that the proposed token fare structure of 11 tokens for one dollar or 10-cent cash fare in the alternative, would result in a 90% purchase of tokens.[73] As we shall establish, the Commission thus prejudged a matter of vital importance affecting the determination of the question whether a substantial portion of the downtown riders would pay a 10-cent cash fare, instead of an 8-cent or 9-cent cash fare. In so

[73] R. 322.

doing, the Commission disregarded, among other matters, its plain obligation of placing the burden of proof upon the carrier to establish the reasonableness of the proposed increased fare.

When the hearings were reopened in September, the company engaged in a feeble and unsuccessful effort to buttress the Commission's conclusion.[74] But even here the burden of proof was placed not upon the carrier but rather upon the protestants to overcome the Commission's prejudgment of the issue.

The only evidence presented by the company on the point was the unsupported statement of its president, who had had no prior experience in the development of token fare or fare structure. He stated that in his opinion, 90% of the users would buy 11 tokens for $1 rather than pay a 10-cent cash fare. No studies of any kind were made or produced by the company, as the excerpts from cross-examination below clearly reveal[75] and the company's president admitted

---

[74] Tr. 2072–3, 2158, 2162–3, 2200.

[75] Testimony of Walter F. Brown, President, Hudson & Manhattan R. R. Co. (Tr. 2125):

"By Mr. Booth:

"Q. And did you have a written report submitted to you on this question prior to July?

"A. A written report?

"Q. Yes, sir.

"A. Well, I don't remember any written report.

* * * * *

"Q. Did you consult the Interstate Commerce Commission before you prepared this affidavit?

never having seen the A. T. A.'s authoritative published study on the subject. No effort was made to obtain the views of its passengers upon this point, and, as we shall demonstrate, in arriving

---

"A. Well, I don't know just what you mean by that.

"Q. Well, does the Interstate Commerce Commission have any local transportation experts or people who might be experts in the development of token fare structures?

"A. Why, I did not ask any advice from them.

"Q. You did not?

"A. No.

* * * * *

"Q. And now may I direct your attention to this volume which I hold in my hand, which is headed, 'American Transit Association, Affiliated Organizations, Proceedings, 1937.' Have you seen this volume?

"A. No; I have never seen it.

"Q. Have any of the men called your attention to it, with whom you became or were associated in connection with this problem?

"A. No; I do not believe I ever heard of it.

"Q. All right. Did you examine this report? I refer you specifically to page 928 of the 1937 proceedings, the Report of the Committee on Fare Structures, and ask you whether you read that report?

"A. I told you I have never seen the book.

"Q. Well, it might be that you have seen this report, Mr. Brown.

"A. No; I have never seen the report.

"Q. You have never seen the Report of the Committee on Fare Structures for 1937 of the American Transit Association?

"A. Well, I don't think so."

Testimony of John C. Van Gieson, General Superintendent, Hudson & Manhattan R. R. Co. (Tr. 1806):

"Q. Now, your patrons are people that generally live in the metropolitan district and use you pretty regularly; isn't that right?

at this estimate as well as the proposed token fare structure, the company disregarded completely the experience of the transit industry in dealing with token fare structures. The record clearly indicates that the 90 percent figure was

---

"A. That is right.

"Q. Now, couldn't you take care of those people to their convenience and to your convenience by selling them tokens enough to last them for a week, even at the eight-cent fare, tokens representing eight cents apiece?

"A. Well, that might sound all right to you, Mr. Bauman. It would seem on its face to be a time-saver, but I think that there is a bit of fallacy in that."

Testimony of John J. Fritsch, Comptroller, Hudson & Manhattan R. R. Co. (Tr. 2222–2223):

By Mr. Booth:

"Q. Mr. Fritsch, where did you get this 90-percent figure that constitutes the basis for your exhibits 147 to 150?

"A. That is the basis that was given to me in order that I might prepare these figures.

"Q. Who gave it to you, Mr. Brown?

"A. It was arrived at at a conference with Mr. Brown and the attorneys.

"Q. Who participated in this conference, the attorneys and Mr. Brown?

"A. That is all that I know of.

"Q. Mr. Finerty?

"A. No.

"Q. Mr. Buck?

"A. Mr. Buck.

"Q. You had nothing to do with the estimate of 90 percent yourself?

"A. No.

"Q. You are not sponsoring that 90 percent figure?

"A. No.

"Q. And you have never participated in the preparation of any fare or token structure in the course of your experience in your career?

"A. No."

pulled from the air for the purpose of enabling the company to obtain its 10-cent cash fare.

While the company, on which the burden rested, presented no probative evidence on this important issue, nevertheless, the Director went forward with concrete and authoritative evidence. Through an expert witness, the Chief of the Local Transportation Section of the Office of Price Administration, a trained engineer and statistician, he produced concrete and authoritative studies made on the token fare problem. This testimony included Exhibit F–142, a study of token fare structure made by the American Transit Association, and a recent check made of various transit companies to determine the accuracy of the American Transit Association study. The evidence[76] revealed the following:

(1) That a token fare structure requiring an investment of a dollar with a differential of only

---

[76] Tr. 2424–2444. In Appendix B to its brief, the Commission presents what purports to be a summary of all the evidence in the record. That caution is requisite in its use is indicated by its summary of the evidence dealing with token utilization. Thus, on p. 75 appears the following statement:

> Witness Kosh, for the O. P. A., testified that in 1929 and 1930, 85 percent of the people using buses in Cincinnati purchased tokens (p. 2438).

That is what the witness stated, but he was not talking of token use on the basis here proposed but of token use at a 10-cent cash fare and *3 tokens for 25 cents*. And he also stated that when the token fare was changed to 5 tokens for 45 cents, use dropped to 60%. If the Commission had

10% between the cash and the token fare would normally indicate 33% instead of 90% utilization of tokens.

(2) That no transit company in the nation is currently maintaining a token fare structure similar or substantially similar to the token fare structure suggested by the company.

(3) That the purchase of token fares depends almost entirely upon the amount of the initial cash outlay required and the difference between the cash and the token fare."

(4) That in Chicago, where a dollar outlay was required for tokens, only a 6% utilization was indicated.

(5) That a current check made by telegram of 10 companies demonstrated the substantial accuracy of the American Transit Association study.

---

summarized what the witness said about token use on the basis here proposed, the ratio would have been in the neighborhood of 35 to 45%. On p. 76 the following is found:

> Witness Kosh would express no opinion on the percentage of token passengers, 11 for $1.00 (p. 2459).

That statement misleadingly suggests that there was no evidence that token utilization would be other than claimed by the company, i. e. 90%. The reverse is true. What Witness Kosh would not say was what the *exact* token utilization would be under three different fare combinations, 10 tokens for 90 cents, 11 for 90 cents, and 11 for 99 cents.

" *State of Minnesota* v. *St. Paul City Railway Company*, 7 P. U. R. (N. S.) 174 and *Fed. of Citizens' Assns.* v. *Cap. Tran. Co.*, 47 P. U. R. (N. S.) 187 (1943).

The findings by the Commission in connection with the study were contrary to all the evidence in the record. These findings were:

> * * * there is no indication that the traffic characteristics of any of the companies are similar to those on the lines of respondent, particularly with respect to the volume of traffic and the concentration thereof in peak periods at particular stations, such as at Hudson Terminal. (R. 281.)

The only evidence in the record shows that peak traffic characteristics for the test companies are similar to those of the Hudson & Manhattan Railroad (Tr. 2468–9). There is also uncontradicted evidence in the record that Exhibit F–142 is applicable to the company (Tr. 2461, 2466–7). It is also noteworthy that when appellees asked for a short time to perfect this study on the very points here objected to by the Commission (Tr. 2462), such request was denied. In general, there was no evidence of the study's inapplicability, but there was clear evidence of its applicability. Indeed, the Commission does not take its own objection to applicability very seriously, using Exhibit F–142 to draw its own conclusion as to a reasonable token utilization (R. 279–281).

The Commission's analysis of Exhibit F–142, with its conclusion that a 90% token utilization is probable, is based on errors in elementary statistics so obvious and so demonstrable as to require

the rejection of the conclusion as being without any foundation in the record.

The Commission, in its last order, attempted to justify its adoption of the company's guess that at the proposed fare the token utilization would be 90%. If the interpretation of Exhibit F–142 were a matter of judgment, with room for difference of opinion, then the Commission's conclusion would have to be accepted as beyond judicial review. However, in its analysis of the exhibit, leading to a finding that a reasonable utilization would be 79.46%, the Commission made a few fundamental errors in elementary statistics.[78] These brook no

[78] 1. The Commission finds the maximum deviation in actual token utilization, as between two companies using the same combination of fares. This deviation in *actual* utilization is added to the *estimated* utilization for the particular fares in question. This addition of two unlike quantities is a fundamental error in elementary statistics.

2. To this illegitimate hybrid of two unlike quantities, is added a second deviation, this time the maximum deviation between the predicted value (as per Exhibit F–142) and the extreme actual utilization as shown in the telegraphic spot check. This addition of a second deviation is absolutely erroneous; a deviation indicates the probable discrepancy between the estimated figure, and the true figure. The addition of two deviations is utterly meaningless.

Had the Commission noted the explanatory material that was part of Exhibit F–142, it would there have found, specifically stated, the statements of reliability of the estimates made. It was there explicitly stated that the 33.76% estimated figure could be expected to hold within 4.2 percentage points, up or down, in 99 out of 100 cases; that it would be expected to hold within 2.8 percentage points in 95 cases out of 100; and that it could be expected to hold within 1.4 per-

argument and allow no difference of opinion. They vitiate its conclusion as to token utilization.

The Commission also erred in stating in its order (R. 281–282)—

> * * * it is likely that the traffic characteristics of the lines of respondent differ greatly from those on the lines of the other companies referred to of record, *and therefore* the 90–10 percent ratio urged by respondent appears to us to be within the range of probable achievement under the proposed fare basis. [Italics supplied.]

Firstly, the above finding is clearly without any foundation in the record. In fact, as shown above, the Commission complains that there is nothing in the record to demonstrate the similarity of characteristics. That, as we have shown, is not true. There certainly is no evidence that conditions are different, if certain innuendos by the company's counsel are disregarded. Hence, the finding of the likelihood of the difference in traffic characteristics is entirely without support in the record.

However, a still more flagrant error appears in the above quotation. Even if it be assumed, *arguendo*, that it *is* likely that these characteristics are different, does it *"therefore"* follow that, of every possible token utilization, the 90–10 use

---

centage points in 68 cases out of 100. These limits are estimates of reliability that any trained statistician would derive from an independent analysis of the basic data in the study.

ratio is correct or even probable? The Commission assumed its August 3rd prejudgment of the validity of the 90% utilization to be correct, and Appellees were told, in effect: "Disprove that ratio; otherwise we'll adopt it, of all possible choices, as correct." This was an error in law as well as in reasoning and in fact.

C. THE COMMISSION ACTED ARBITRARILY IN REJECTING THE TESTIMONY OFFERED BY THE DIRECTOR WHICH, BY BRINGING THE RAPIDLY CHANGING WARTIME CONDITIONS DOWN TO A REASONABLY PROXIMATE PERIOD, WOULD HAVE SHOWN THAT NO FARE INCREASE WAS REQUIRED SINCE, WITHOUT ANY FARE INCREASE, THE COMPANY'S INCOME HAD RISEN TO SUBSTANTIALLY THE LEVEL WHICH THE COMPANY HAD SET AS ITS GOAL WHEN IT INITIATED THE PROCEEDING IN JUNE 1942, AND WHICH THE COMMISSION IN ITS JUNE 8, 1943, ORDER HAD FOUND NECESSARY TO INSURE ADEQUATE TRANSPORTATION SERVICE.

1. *The record on which the Commission's order of November 2, 1943, was based was stale, especially in view of the importance to effective stabilization that determinations as to rate and fare increases be based upon current data*

The Commission's order of November 2, 1943, which, together with the order of June 8, increased the fare on the downtown line from 8 cents to the alternative fare basis of 11 tokens for $1 or 10 cents cash, was based on a record containing no accurate data as to the company's income *for a period of 14 months prior to the order's effective date.* The record on which the June 8 order was based was closed September 19, 1942. It contained evidence of the Company's

operations no later than August 1942. To this was added, at the April 1943, oral argument, a one-page stipulation showing the road's total (but not net) revenues and passengers for January and February 1943. Finally, in the September 1943 hearing evidence was admitted which bore on the use of tokens.

The Commission does not seem to have appreciated how stale it had allowed the record to become, for in its November 2 order it erroneously assumed that it had had complete financial data for the entire year 1942."

An established principle governing the administrative regulation of common carrier and other utility rates is that, where conditions have materially changed since the holding of a hearing to establish such rates, a refusal to reopen the hearing to receive evidence bearing upon the changed conditions, is an "action not within the permitted range of the Commission's discretion," but "a denial of a right." *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248; see also *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349, 389.

---

[79] "At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, *the traffic and revenue results on the lines of respondent for the year 1942* and the traffic results for January and February 1943, the latest periods for which any such results were then available were by agreement of the parties made a part of the record" (R. 275). [Italics supplied.]

True, this Court has recognized that for the orderly administration of the functions of rate-making agencies, records may not be kept open indefinitely. The question, of course, is whether the Commission has acted arbitrarily and unreasonably in the light of the circumstances of the particular case. If precedents are to be invoked, they must be used with discrimination, and, in particular, peacetime precedents are to be distrusted.[*] Recognition, must be accorded, in the

[*] Apart from the significance of the change to wartime conditions, it is submitted that the following cases relied upon by appellants, are not in point:

United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494, wherein the Court held that the Commission is not required to grant rehearing in every rate case for changed economic conditions, however insignificant the effect on carrier revenue; that the carriers should not be allowed to sit by, take their chances on a favorable decision, and then reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted.

Acker v. *United States*, 298 U. S. 426, 433, wherein the Court found that the petitioners had full opportunity to produce all pertinent evidence before the record was closed, and that it was "inconceivable that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive."

In the two foregoing cases the carriers were attacking rate orders though they had failed to produce at the hearing evidence within their peculiar power and province to produce. In the instant case, Hudson & Manhattan refused in September 1943 to produce any evidence as to its operating income and revenue needs beyond August 31, 1942, despite—or rather because of—the fact that its income had been experiencing an increase which negatived all revenue needs.

instant case, to the special wartime responsibilities devolving upon the Commission by reason of its place in the stabilization program.

If the Commission is to play the role which the Congress has reserved for it, it cannot base decisions directly increasing the cost of living on records over a year old. The wartime economy is a dynamic one; conditions alter rapidly; new demands for service arise overnight; occasionally cost increases strike with equal celerity. To recognize these facts is not to demand the administratively impracticable or to require rates to fluctuate from month to month. It is enough here to condemn a refusal to consider the drastic changes wrought by 14 months of total war on a carrier providing commuting service to the public in a vital defense area.

The record was replete with evidence of the effect upon the carrier's revenues of private automobile traffic. War laid a drastic hand on that traffic. The restrictions which were first imposed in 1942 became more severe as 1943 wore on.[8]

---

[8] Thus, on May 20, 1943, Supplement No. 2 to OPA Order 5C, 8 F. R. 6687, was issued effective the same date, designating the North Atlantic Coastal area, including New York and New Jersey, as a "critical gasoline shortage area" and prohibiting the use of automobiles for pleasure and non-essential travel.

On March 20, 1943, Amendment 37 to rationing Order 5C, 8 F. R. 3616, was issued effective until November 8, 1943, reducing the allotment on Class A from 3 to 1½ gallons in the critical gasoline shortage area, including New York and

The immediate beneficiary of these wartime restrictions was the Hudson & Manhattan. Indeed, its petition for fare increase filed on June 27, 1942, was founded on the frank declaration that its normal competition was abated by wartime restrictions on automotive transportation, and that its volume of traffic had so increased due to wartime conditions that it could raise its fares above the level which the Commission found in 1938 to be its maximum ceiling under normal competitive conditions (R. 394, 398).

Ready as the carrier was to use this change to its advantage, it was equally ready to oppose with the Commission any inquiry to determine whether the change had progressed to the point where the company could no longer show a need for increased fares.[22]

The Commission was, of course, well aware of the trend to which it resolutely shut its eyes when the Director came before it with evidence showing where the trend had carried the Hudson & Manhattan's revenues. Back in December 1941, at

---

New Jersey. (This allotment has since been increased to 2 gallons.)

On June 1, 1943, Amendment 5 to Supplement 1 of OPA Order 5C, 8 F. R. 7391, was issued effective June 2, 1943, reducing B and C coupons issued to those engaged in preferred occupations from 5 gallons to 2½ gallons per week in the "critical shortage area" including New York and New Jersey. This reduction, sharply restricting the worker who had been commuting by auto, was, of course, of special significance from the standpoint of the Hudson & Manhattan.

[22] Tr. 2149–50, 2198–9, 2215, 2218–9, 2228, 2446–50.

the beginning of the war, in *Ex Parte* 148, all the Class 1 railroads joined in demanding a 10% increase in freight and passenger rates in order to meet the higher wage and price levels which had resulted from our war effort. Certain increases were authorized as necessary to enable the carriers to function efficiently in wartime.[83] A year later, upon insistence of the Office of Price Administration, the Commission reviewed the situation. It was found that passenger revenues had increased 99.8% within a year, that increased traffic had far more than outweighed all increases in operating expenses, and that the railroads were beginning to enjoy unprecedented prosperity. In April 1943 the Commission rescinded the increases in freight rates which it had authorized the year before. And while it allowed the 10% increase in passenger fares to stand, largely as a deterrent against an excessive volume of traffic, it is especially noteworthy that, two months before its June 8 order increasing the fares of Hudson & Manhattan, *the Commission rescinded that increase as to commutation fares.*[84]

In preparation for the reopening of the hearing, the Director was faced with the problem of showing the earnings attributable to the carrier operations of the company, which owns two large

[83] *Increased Railway Rates, Fares, and Charges, 1942*, Ex Parte 148, 248 I. C. C. 545.

[84] *Increased Railway Rates, Fares, and Charges, 1942*, Ex Parte No. 148, 255 I. C. C. 357.

office buildings. Accordingly a request was promptly made of the Company that it furnish information bearing on the following points (Tr. 2446A):

(1) Operating Expenses (detailed by lines operated, if available):
(a) 1942.
(b) 1943 (as much as available).
(c) 1942 (period corresponding to 1943).
(2) Operating Revenue (detailed by lines operated):
(a) Same periods as (1) above.
(3) Income Statement (detailed by lines operated if available):
(a) Same periods as (1) above.
(4) Profit & Loss Account:
(a) Same periods as (1) above.
(5) Balance sheet:
(a) Dec. 31, 1942.
(b) Latest date available.
(6) Road & Equipment:
(a) Same as (5) above.
(7) Nonutility operation:
(a) Revenue.
(b) Expenses.
(c) Balance sheet.
(8) Bonds Outstanding:
(a) Mortgage Bonds.
(*1*) Amounts outstanding at end of 1940, 1941, 1942 and latest date 1943.
(b) Income Bonds.
(*1*) Same as (a) above.

(9) Interchange Revenue from Penna. R. R. (if not detailed on Income Statement):

(a) 1942.

(b) 1943 (as much as available).

(c) 1942 (period corresponding to 1943).

(10) Passenger Volume:

(a) By individual line.

(1) By month—Jan. 1942 to date.

The data sought were prepared by the company and brought to the hearing (Tr. 2227), but it declined to furnish them[85] unless required by the Examiner to do so. The Examiner sustained the company in its refusal (Tr. 2228). He had suggested to the appellees that they seek a modification of the Commission's order of September 18 fixing the limits of the reopened hearing (Tr. 2147, 2148). But when, on October 14 (R. 67), the Director did petition for a modification, his petition was rejected (R. 272).

In view of the marked change in the carrier's fortunes since the close of the record in September 1942, the refusal of the Commission to call for the production of evidence on the points noted above or to modify its order for this purpose, represented a refusal to predicate its action upon actual facts. Furthermore, it represented a refusal to accept even a limited responsibility for the stabilization of the cost of living.

[85] The company had furnished the Director information on item (10) above, but had refused to do so on the other items (Tr. 2228, 2446).

2. *The importance of a fresh record to the establishment of just and reasonable fares in this proceeding was rendered critical by the special circumstances of the case, namely, that the proceeding was initiated on the basis of changing conditions and revenue needs, and that the Commission's June 8 order not only was based on a calculation of revenues to be obtained under changed conditions but also declared the Commission's willingness to modify its order whenever a further change of conditions should render the revenue results to the carrier "materially different" from those estimated*

When a carrier initiates a proceeding on the ground that a change in conditions has brought about certain adverse conditions, such as higher operating costs, and certain favorable conditions, such as the ability of the traffic to bear a higher fare, the carrier is seeking to take advantage of fluctuations in the economy which may alter their course before the proceeding it has initiated is decided. Certainly it is in no position to insist that change in conditions should be considered only up to the point where those conditions begin to become so favorable as to render a fare increase unnecessary. So long as the proceeding is open, so long as evidence as to the effect of changing conditions is readily available, for the Commission to refuse to consider such evidence is both arbitrary and unreasonable.

Especially is this so when the purpose of the proceeding is merely to provide fares yielding

revenues adequate to meet the carrier's current needs. In contrast, a determination of the fair value of a utility's property and the establishment of rates to yield to the utility a fair return over a period of years may be made and adhered to despite known changes in conditions. Both valuation and rate structure are designed to endure all but major cyclical fluctuations. In the instant case, however, the company's move was purely opportunistic.

The nature of the proceeding which the carrier initiated in June, 1942, and its dependence on change of conditions are clearly revealed in the following excerpts from its petition (R. 399–402):

> * * * Despite the increase in the total traffic of petitioner during the current year as a result of the abnormal conditions just specified, the probability is remote that, even during the continuance of such abnormal conditions, the traffic of petitioner will increase by as much as 20 per cent. over such traffic in 1941. (Part XVII.)
>
> Even with a 10-cent fare on the downtown line of petitioner, its total traffic would have to increase 12 per cent. over its total traffic for the year 1941 in order for petitioner to earn its current bond interest requirements, assuming that there should not be any increase in rates of pay of employees, in unit prices of materials and supplies, or in taxes. Petitioner believes and alleges that there is a reasonable probability that its total traffic may in-

crease within a reasonable period to an extent sufficient with a 10-cent fare on its downtown line, to enable petitioner to meet its current bond interest requirements. (Part XVIII.)

It is essential that petitioner promptly obtain the increased gross revenues which will result from an increase in the fare on it downtown line to 10 cents in order that petitioner, without further delay, may have at least a reasonable possibility of meeting the current interest on its bonded indebtedness after providing the public with adequate and efficient railway transportation service, since, despite the increase which reasonably may be expected in the total traffic of petitioner, such additional gross revenues cannot be obtained except by the establishment of a fare of 10 cents on its downtown line. (Part XXII.)

As has been seen, the Commission focused its attention in the proceeding culminating in the June 8 order on the question whether the proposed increase would meet the revenue needs of the carrier. In its order of June 8 the Commission does not pause to inquire whether the carrier's alleged revenue needs are excessive.

The Commission in its order of June 8 stated:

The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest on its bonds. This it should be permitted to do if it can be done without

casting an undue burden on any particular traffic.

Moreover, recognizing the hazard that continued change would undermine its calculations, the Commission declared in the same order:

> It should be understood that if at any time prior to the expiration of that period (duration of the war and six months thereafter), by reason of changed circumstances or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to bring the facts with respect thereto to our attention at a further hearing.

Surely it was not necessary for the Commission to compel the economic disturbance incident to a local fare increase in order to determine whether its June 8 calculations were sufficient.

3. *The carrier is in error in its contention that the decision of this Court in Vinson* v. *Washington Gas Light Co. that the restriction on the scope of the particular proceeding there involved was reasonable, constitutes a holding that the Director had no "standing before the Commission entitling him to tender" evidence of this carrier's income under wartime conditions as bearing upon its right to a rate increase*

Under the Act of October 2 utilities and common carriers are required to notify the President's designee of proposed rate increases.

Acting on behalf of the Director, the Administrator must determine whether to oppose an increase. He ordinarily determines whether, in view of the financial position of the carrier or utility and utility rate-making principles giving due effect to the war, the public interest requires that an increase be opposed. An intervening petition is thereupon filed which has always been granted by the regulatory commission.

In the case of public utilities and particularly of carriers engaged in local transportation, one of the basic questions which enters into the judgment of the Director's representative in determining whether to oppose an increase is whether, in view of the improvement of the company's business as a result of the war and the restrictions imposed on competitors, any increase in rates or revenue is necessary. If, after determining, on the basis of an analysis of the company's revenues and operating expenses and such other data as are relevant to the establishment of just and reasonable rates, that a proposed rate increase is not justifiable, the Director were to be denied the right to present such evidence, it is clear that the Congressional intent in creating the notice-and-intervention procedure would be frustrated.

Certainly that intent cannot be effectuated by the presentation solely of testimony with respect to the inflationary effects of rate increases. In the scores of cases before this Commission, in which the Director, through the Price Adminis-

trator, has appeared to oppose rate increases that have seemed to him unnecessary and unjustified, the repeated parroting of the basic principles of inflation control would long since have rendered his participation in the proceedings a waste of time and energy. And, where, as is not infrequently the case, he is the sole protestant, there would be no adequate basis in the record for the Commission's cancellation of the protested rate if the Director's representative were allowed only to read a lecture in elementary economics to the examiner. As has been pointed out, the Commission's staff presents no evidence.

The decision of this Court in *Vinson* v. *Washington Gas Light Co.* affords no basis for the company's assertion. Here the Director intervened in a proceeding of a highly specialized character, relating to a continuing arrangement, composed of, and subject to a complex body of rules. In his effort to demonstrate to the Public Utilities Commission of the District of Columbia that the increase required by the sliding-scale arrangement there in effect was unnecessary, counsel for the Price Administrator (and later the Director) sought to inquire into certain aspects of the company's rate base, rate of return and depreciation under the arrangement. The Commission's refusal to consider these matters was based on its desire not to depart from the established procedure for making the annual determination

of rates under the sliding-scale arrangement. Indeed, it insisted that its rules as to notice precluded it from entertaining such inquiries. The Court of Appeals for the District of Columbia concluded that what the intervenor was seeking was a "complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body." [88]

This Court, in reviewing the action of the Commission and of the Court of Appeals which sustained it, reached the conclusion that the Commission had granted a fair hearing and that it was justified in adhering to the limitations on inquiry imposed by its order of investigation.

Although the Court recognizes—as do we—that an administrative agency may, in the conduct of *quasi*-judicial proceedings, impose reasonable terms on the admission of an intervenor thereto, the judgment in a given case as to what terms are reasonable and what arbitrary, depends on the facts of that particular proceeding. Certainly there is little resemblance between the two cases when thus compared. Far from having given any ground for the belief that he was seeking a complete, or even a protracted, investigation of the company's affairs, counsel for the Director had, as has been seen, carefully arranged for the pres-

[88] *Washington Gas Light Co.* v. *Byrnes*, 137 F. (2d) 547 (Ct. of App., D. C.), quoted in *Vinson* v. *Washington Gas Light Co.*, *supra*.

entation, when the hearing reopened, of pertinent current data bearing directly on the issues as they had been framed both by the company and by the Commission. This basic information was at hand, witnesses were ready to testify, ordered to do so, and still the Commission refused to act—even after, at the suggestion of its Examiner, the Director had petitioned for a modification of the restrictive rule under which the reopened hearing had been conducted.

The terms thus imposed and adhered to by the Commission were not only unreasonable but they were in violation of its fundamental duty not to act on the basis of a record which change of conditions has rendered obsolete.

4. *The company's contention, raised for the first time on this appeal, that, since the appellees did not show that the 8-cent fare would have yielded a fair return on fair value or that the increased fare would have exceeded such a return, the evidence tendered by the Director was irrelevant, is unjustified since the Commission did not find the fair value of the company's railroad properties and the company presented no evidence nor did it request that any findings be made on that issue.*

In Point II of its brief, the company makes the novel contention that the evidence offered by the protestants before the Commission was im-

material and that its exclusion was therefore not a denial of a full and fair hearing. The basis for this position is as follows: First, the Commission could not legally have limited the company to such fares as would yield merely its current bond interest, since the company was entitled to earn a fair return on fair value. Second, the District Court did not find, nor did the appellees contend, that the 8-cent fare would yield such a fair return or the enjoined fares exceed it.

True, no such finding or contention was made. The company had offered no evidence and sought no findings on fair value. It had not attacked the 8-cent fare before the Commission for failing to yield a fair return nor had it made the present argument before the District Court. But the basic objection to the company's contention is that it would establish a standard for the right to fair hearing by which no person could be found to have been denied a fair hearing whose rejected evidence was not, as a matter of law, conclusive of his case. Such a standard would drastically curtail the guaranty.[88a] Applied to this case, it would deny to the Director the right to show that the 8-cent fare would meet current bond interest

[88a] Cf. National Labor Relations Board v. Indiana & Michigan Electric Co. et al., 318 U. S. 9, 28: ". . . Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

requirements until he was prepared to establish the present fair value of the carrier properties devoted to the public service, to show what was a proper rate of return thereon, and to show that the 8-cent fare would have yielded that return. Further, the Director would have had to show that the rate of return yielded by the increased fares would have exceeded that reasonable return.

In other words, in order to achieve the right to a full hearing on the revenue issue, on the basis of which the proceeding was conducted by both company and Commission, the Director must be ready to convert the case into a valuation proceeding. In the light of the *Washington Gas Light Company* case, it is easy to predict what the appellants' arguments would have been had the Director attempted to do so.

If the company now wishes to establish its right to rates higher than 8 cents on the ground that such rates do not yield a fair return, let it petition the Commission for a rate increase on that basis and establish its case by clear and convincing proof, showing from which of its several services it might properly demand the additional revenue. Unless and until that is done, the Director should not be called on to show that a fare which will yield revenue in an amount substantially as large as the Commission found sufficient is not so low as to deny the company a fair return.

D. THE COMMISSION'S ORDERS WERE UNLAWFUL UNDER SECTIONS 1 AND 15a(2) (2) OF THE INTERSTATE COMMERCE ACT, PROPERLY CONSTRUED AND APPLIED IN THE LIGHT OF WARTIME ECONOMIC CONDITIONS AND GOVERNMENTAL CONTROLS

1. *Even though the proviso to Section 1 of the Stabilization Act imposes no limitation on the Commission's authority under the Interstate Commerce Act, nevertheless, the Commission was obligated, in applying the standards prescribed by its own Act, to give consideration and effect to wartime conditions and the stabilization program*

In *Vinson* v. *Washington Gas Light Co., supra,* it was contended on behalf of the Director, that the proviso to Section 1 of the Stabilization Act imposed an obligation on regulatory agencies to grant no increases in rates above the levels prevailing on September 15, 1942, unless such increases were clearly shown to be necessary to aid in the effective prosecution of the war or to correct gross inequities. This Court, however, found no limitation in the Stabilization Act on the "existing powers conferred by law on regulatory commissions throughout the nation."

The Director does not seek a reconsideration of that decision. But he submits that that decision does not relieve this Commission of the obligation, in the exercise of its authority to establish just and reasonable rates, to consider and give effect to war conditions and particularly to the Con-

gressional wartime policy, embodied in the Emergency Price Control and Stabilization Act, to stabilize the cost of living and to avoid unnecessary increases in the cost of the war. Such an obligation is implicit in the concept of "just and reasonable" rates and is fortified by the requirement that agencies of the government accommodate the administration of the policies for which they are responsible to those policies declared by the Congress which impinge on their sphere of operations.

This does not mean that the Commission must invoke new criteria in applying its statutory standards in wartime. It does mean that the Commission must be more vigilant and rigorous in employing the criteria which its statute now prescribes. Section 15a(2) of the Interstate Commerce Act requires that, in determining whether proposed rates are just and reasonable, the Commission must give due consideration to the factors specified therein, among them

> the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In view of this provision, it seems clear that the Commission could not have given adequate

effect to wartime conditions and to the stabilization program, unless it had found that the increased fare burdening the users of the company's downtown line (1) represented "the lowest cost consistent with the furnishing of such service" and (2) was required by "the need of revenues sufficient to enable" the company "under honest, economical, and efficient management to provide such service."

The protestations by the Commission in its report of November 2 and in its brief [87] that it did not disregard the stabilization program can best be tested by whether it met the statutory criteria set forth. This test can be made in the light of the record upon which the Commission acted, without reference to the evidence which the Director tendered at the reopened hearing and which, the Commission insisted, it considered before concluding that it would not be "warranted in modifying (its) findings as made in the second report."

However, before turning to consider whether the Commission complied with the criteria expressed in its statute, attention must be directed to the Commission's erroneous assumption that, because the increases in fare were small in absolute amount, they would not conflict with the stabilization program. As the Commission put the matter in its June 8 order:

---

[87] Commission's Brief, p. 50 ff.

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein, approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

The Commission's adherence to this point of view represented in effect a disclaimer of responsibility for the inflationary effects of its actions. The Commission never is called upon to authorize a rate or fare increase which is large in absolute terms. Apparently it is only when a vast multitude of these small increases is aggregated in a single action, as in *Ex parte 148,* that the Commission grows conscious of its stabilization duties.

Since this error vitiated the Commission's whole approach to the problem of applying its statutory standards in wartime, the statutory court was correct in selecting it as one of the two errors to be cited as grounds for its injunction. The court's position was amply buttressed by the opinions of the Emergency Court of Appeals dealing with the same issue, to which the statutory court referred in the following passage from its opinion.

The gauge urged on behalf of Director Vinson was that set out in *U. S. Gypsum Co.* v. *Brown,* 137 F. 2d 360, where the United States Emergency Court of Appeals, speaking through Chief Judge Maris said at page 364:

"The mere fact that the increase is small and therefore will not bear too hardly upon either party to a sale is of no consequence. It is the cumulative effect of millions of small increases in prices and other costs throughout the economy which starts the inflationary spiral. See *Lincoln Sav. Bank* v. *Brown,* 137 F. 2d 228."

In the case of *Philadelphia Coke Company* v. *Chester Bowles,* U. S. Emergency Court of Appeals, December 15, 1943, not yet officially reported, the Court said:

"In a complicated economy such as ours the phenomena of price increases are the result of a complex of causes, the interaction of many economic forces. When inflationary pressure is one of the major forces operating in the economy it is wholly unrealistic to consider the price of a single commodity as in an economic vacuum and say that no threat of an inflationary increase can be discovered. Each commodity price must then be considered in the light of the fact that it forms an integral part of the whole price structure."

That the need to be vigilant against the unnecessary small increase cannot be made to depend

on direct evidence of its inflationary character is also made clear by the Emergency Court in the *Philadelphia Coke Co.* case, *supra,* when it added:

> To stabilize prices in an economy the whole of which is under general inflationary pressure involves holding them steady against any and all increases even though it may not be apparent that such increases have been brought about by inflationary pressure or that they will in their turn tend to increase such pressure upon the prices of other commodities.

In the briefs of the company [88] (which is natural) and the Commission [89] (which is surprising) appears an attempt to make capital of the underlined passage in the following quotation from the exceptions to the examiner's report filed by the Price Administrator on behalf of the Director in the original proceeding. Since this action so sharply underscores the Commission's failure to appreciate the nature of its stabilization obligations, the passage will be quoted in the context in which it originally appeared:

> We apparently were in error in our assumption that the elementary factors which contribute to the inflationary spiral would be readily understood by those interested in the reading of our brief. What we had reference to was that spiral which starts

[88] Company's Brief, p. 83.
[89] Commission's Brief, pp. 8, 29.

with increases in cost of necessary living items. The pressure placed on the individual by the snowballing of such increases occasions him to demand higher wages. The employer needs increased revenues to offset increased operating costs resulting from such increased labor costs. Thus the circle is complete. Then the same things continue the spiral until we are ultimately faced with the threatened destruction of our economy by inflation. To this we had reference. *We did not, nor do we now, suggest that this proposed increase in fare will in and of itself result in inflation. Such a suggestion would, of course, be asinine.* But rather we suggested that such increase when coupled with other increases in the cost of living commence the rise of that spiral, which, if not arrested, must lead inevitably to the pitfall of inflation. It was not said that the increase of fares in itself "would ultimately result in disastrous inflation." We ask that the report be corrected to conform to the facts.

2. *On the record before the Commission, it could not reasonably conclude that the increased fare which it authorized was "the lowest cost consistent with the furnishing" of "adequate and efficient railway transportation service" or that it was necessary to meet "the need of revenues sufficient to enable the carriers, under honest,*

economical, and efficient management to provide such service"

The Commission in its second report made such calculations as to future wartime traffic trends and revenues as the state of the record before it permitted. The calculations which it made, worked out with respect to 8-, 9- and 10-cent fares, are indicated in the accompanying table.

It is evident that, on the Commission's own estimate, the 8-cent fare would have enabled the carrier to earn approximately $30,000 more than full interest on its bonds if provision is made, in the calculation of its income, for $240,000 a year which the company was accruing to a "War Risk Reserve," and for $150,000 which the Commission found to be the minimum amount to which the company was entitled by increased divisions of joint fares.

Computing the accruals and prospective divisions in the same way, a 9-cent fare would have yielded about $250,000 more than full bond interest and a 10-cent fare, over $400,000. Moreover, these computations are made on the basis of interest charges on bonds outstanding as of August 31, 1942, whereas the company's practice of buying its bonds at greatly depreciated market prices would have brought about some reduction in these charges during the course of the year.

An Analysis of the Commission's Own Estimate of the Effect of the Increase Authorized in the 8-cent Fare in the Light of the Company's Bond Interest Requirements

Source of Income	8¢ fare	9¢ fare	10¢ fare
Income available for interest on bonded indebtedness, as estimated by Commission	$2,181,460	$2,404,502	$2,564,144
Amount accrued by carrier to War Risk Reserve, improperly treated by Commission as a legitimate operating expense	240,000	240,000	240,000
Increased divisions of joint fare [1]	150,000	150,000	150,000
Total income	2,571,460	2,794,502	2,954,144
Amount required to pay full interest on bonded indebtedness outstanding on Aug. 31, 1942 [2]	2,541,053	2,541,053	2,541,053
Excess income under the several rates of fare	30,407	253,449	413,091

[1] The Commission did not find the precise amount which the carrier should realize from increased divisions, but stated that "If no more than the 10 percent increase as made in the joint fares (under Ex Parte 148) were reflected in the divisions of respondent, its revenues would be increased by about $150,000 a year." The carrier's witness contended that increased divisions would bring in $170,000 at most and would not meet the full revenue needs (Tr. 2024). Witnesses for protestants contended that an equitable division of the joint fares would yield a far larger sum (Tr. 1426-7, 1640-3).

[2] As of August 31, 1942, petitioner's outstanding funded debt and the annual interest requirements thereon were as follows:

Series	Principal Amount	Annual Interest Requirements
First Mortgage Bonds, 4.5%	$783,520	$35,258.40
First Lien and Refunding Bonds, 5%	26,572,948	1,328,647.40
Adjustment Income Bonds, 5%	23,542,950	1,177,147.50
Total	50,899,418	2,541,053.30

The above bonds are being systematically retired by the management with available cash at an average rate over the past six years in excess of $100,000 principal amount a month and at an average price of about $40 cash per $100 principal amount of bonds. During the first 8 months of 1942 the company retired $991,000 principal amount of bonds. (Tr. 1315-9, 1833-7, 1855, 1862.)

The Commission characterized the "War Risk Reserve" as "reasonable" on the basis of a vague allusion by the company's president to risk of war damage to "vulnerable spots" in its lines. (Tr. 1264.) At the reopened hearings, the company's counsel objected to questions which would have revealed the true purpose and use of the Reserve (Appendix 22–23), but when protestants later showed that about $400 per year would buy $240,000 in war-risk insurance (id. 45–46), he sought to explain the Reserve as a protection against "damage due to speed-up of war traffic or drafting of experienced employees." Actually, the Reserve constituted a part of the carrier's free income, and, except as expended for the purposes for which accrued, should not have been charged to the rate payers.[90] The Commission's

[90] Cf. Spring Canyon Coal Co. v. Commissioner of Internal Revenue, 43 F. 2d 78 (C. C. A. 10th), cert. den., 284 U. S. 654 (self-insurance not deductible expense).

The accruals to War Risk Reserve, along with accruals to the carrier's depreciation reserve, have been applied in retiring the carrier's bonds. Though the carrier was seeking additional revenue from the rate payers to cover its alleged needs, what the carrier in effect was asking, and what the Commission purported to allow, was an increase in rates which would yield revenues sufficient not only to pay full interest on all the outstanding bonds, but also to pursue a policy of retiring the bonds as well.

The policy thus sanctioned by the Commission works a twofold injustice: (1) an injustice to the bond holders by including as an operating expense $240,000 a year not properly chargeable thereto, thereby minimizing the carrier's earnings and depreciating the market value of the bonds;

failure to recognize this fact in determining the revenue needs of the company renders arbitrary and unreasonable its finding that a fare increase was necessary.

The inclusion of the factor of $150,000 for interline divisions represents a minimum recognition of the company's obligation to seek other sources of revenue before adding to the burdens of the downtown line. Apart from the light which the addition of this minimum estimate of the amount procurable by more equitable divisions casts on the company's claim of need for an increase in its 8-cent fare, the granting of any increase by the Commission while the company remained delinquent in pursuing this other source of revenue was, we submit itself an unlawful abuse of discretion, imposing an unwarranted and discriminatory burden upon passengers on the downtown line.

In its original report and order of July 11, 1938 (227 I. C. C. 741, 762), the Commission had stated that if the company "should feel impelled to seek a further increase in revenue [above that produced by the 8-cent fare prescribed in that order] it should consider doing so on interline traffic." The Commission's decision containing this declaration was upheld by the

---

and (2) an injustice to the rate payers in requiring them to provide funds, under the misnomer of operating expense, with which the carrier can purchase these bonds in the open market at the prices thus artificially depreciated.

United States District Court for the District of New Jersey, *Hudson & Manhattan R. R. Co.* v. *United States*, 33 F. Supp. 495 (1940), in a ruling affirmed by this Court in *Hudson & Manhattan R. R. Co.* v. *United States*, 313 U. S. 98 (1941). In that report, after discussing in detail the nature of the services performed by the company for the Pennsylvania and the existing divisions, the Commission noted the company's protestations that it was "not in a position to seek an increase in those divisions until its present local fare on the downtown line has been increased." And although the Commission then authorized an increase in the downtown fare from 6 to 8 cents, the company did absolutely nothing by way of formal action before the Commission seeking an increase of divisions, from the time of that litigation down to the present. Despite the alleged extremity of its need, it did not even seek greater divisions when in *Ex Parte 148*, the Pennsylvania's commutation fares were raised by 10 percent.

It is apparent that it is a stock refuge for the company to point to the alleged necessity of an increase in downtown fares before it can seek equitable divisions from the Pennsylvania; in its report of June 8, 1943 (255 I. C. C. 649), the Commission, in discussing the possibility of increased divisions with the Pennsylvania, again referred to the carrier's belief that it would "regard itself in a better position to seek an increase in

the downtown division, at least to 8.64 cents," if the "downtown fare were increased to 10 cents." Yet it will be observed that the interline divisions have remained at the same figure since 1923 (Tr. 1296), and that when the downtown single fare was 6 cents, the joint interline fare was 7.64 cents, so that it would seem that mere excess of the single fare over the interline is not an insuperable obstacle to securing a more equitable division of joint fares. From 1918 until 1938, when the downtown local fare was increased to 8 cents, the single fare did not exceed the division (Tr. 1299).

In its reports of June 8th and August 3rd, the Commission repeated its admonition that increased interline divisions be sought, but apparently credited the carrier's highly discountable assurance that it would "undertake to seek promptly such increased divisions * * *;" despite proof that in the past it had done nothing on that score. *At the reopened hearing, it was admitted that the company had done nothing concretely by way of negotiating with the Pennsylvania* (Tr. 2199).

The injustice of the Commission's action in granting an increase in the fares payable by the users of the downtown line is made the more manifest by the Commission's prior recognition of the propriety of a differential between the fare payable on that line and the fare payable on the uptown line. Its November 2 action making the two fares identical was taken without the receipt

of any further evidence to controvert its 1938 conclusion that—

> From the standpoint of the cost of service to respondent, therefore, as well as the value of the service to the passenger, it would seem that if 10 cents is a maximum reasonable fare for the uptown service the reasonable fare for the downtown service must be something less than 10 cents.[91]

Under these circumstances, the failure to maintain the differential constitutes a discriminatory exploitation of the users of the downtown line, made possible only by the fact that, automobile transportation having been sharply curtailed for war need, the traffic on that line could bear the increased charge. Certainly section 15a (2) confers no license to take such action.[92]

3. *Measured by its impact on the company's investors and patrons, the Commission's action in increasing the prices on the downtown line was unwarranted and inconsistent with the national stabilization policy. The increase should have been denied as unjust and unreasonable*

Sitting in review of the action of an administrative tribunal, this Court is concerned with the

---

[91] 227 I. C. C. 741.

[92] If a given rate is all the service is worth, or if a given service is already paying more than its justly allocable share of the total burden, the carrier must look elsewhere for revenue. *Covington and Lexington Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596; *American Toll Bridge Co.* v. *California R. R. Comm.*, 307 U. S. 486.

total effect of the action. It is concerned lest, enmeshed in the technical detail of rate making, the regulatory agency should lose sight of the actual impact of its action upon the individuals or groups who are subject to it. It is concerned also lest that agency, its attention focused sharply on the policies entrusted to its charge, should fail to give due weight to complementary or even conflicting policies which the Congress may have declared. This latter problem, discernible here more clearly than in the *Washington Gas Light Co.* case, is not necessarily a problem of the respective powers of competing agencies for, as here, the demarcation of jurisdiction as between agencies may be clear. Essentially, it is a problem in the effectuation of Congressional policies, a problem peculiarly within the province of this Court to resolve and distinguishable from the more usual problem of the finality of administrative decision in that the controlling considerations in a particular case may as well fall *without* as within the agency's field of special competence.

a. The investor's interest

If the Commission had found the proposed fare increase unjust and unreasonable, what would the impact of its decision have been on investors in the company's securities? Would such an effort by the Commission to comply with the exigencies of stabilization have exacted an undue sacrifice

of the investor interest, even recognizing the fact that investors in fixed income securities are especially the beneficiaries of stabilization? To answer this question, a brief reference is necessary to the company's financial background, already sketched in our counter-statement of the case.

As far back as 1920 the company, in seeking a fare increase, realized the fact that the common stockholders had no equitable claim, and that their securities were in fact worthless. In 1920 the company wanted, as it did here, only enough revenue to pay bond interest. And the Commission held that the stock was only water, in holding:

> Most of the stock was distributed as a bonus with bonds and a large part of it is now held by the Hudson Companies. No dividends have ever been paid on the stock and respondent states that it is not seeking additional revenue for the purpose of paying dividends on the stock, but only to provide payment of interest on its funded debt. (58 I. C. C. 270, 275–6.)

On this watered stock the company paid $11,402,496 in dividends between 1925 and 1932. Even though nothing has been paid since, the stockholders, as a class, have been treated royally. In its order of June 8, 1943, the Commission found that the original cost, less retirements, of the railroad properties was $66,541,352 and stated:

"The original cost *less depreciation* does not appear" (R. 252). [Emphasis supplied.]

In that same order, the Commission found that as of August 1942, bonds outstanding and allocable to railroad properties amounted to $50,899,418. It is now over 35 years that this road has been in operation, substantially as it now exists. We may fairly conclude that the property has depreciated at least $16,000,000, or 25 percent in the last 35 years. If that be true then there *is* no equity left for the stockholders. In fact there is little doubt but that on reorganization, even the income bonds could not be converted at par. Thus in talking of investors, we may consider only the bondholders.

And how have these investors fared? First mortgage bondholders are getting 4½ percent on par, but these bonds selling as they do at about 70,[93] the current yield is about 6½ percent. The first and refunding bonds pay 5 percent on par, and 7¾ percent on the current market price. The income bonds are selling at about 28 (as appellees offered to prove) (Tr. 2222) and a 5 percent coupon means an 18 percent return on the market price. It is this return of 18 percent that the company is asking *as a minimum* when it talks of meeting full bond interest on its income bonds.

[93] Fitch Bond Record, Quotation Edition #1916, April 18, 1944.

Moreover, the appellees would have undertaken to prove, if permitted, that the company is now earning *full* income bond interest at the existing 8 cent fares.

Under these circumstances, to increase fares to the company by from 13 to 25 percent in order to increase earnings of income bondholders above the 18 percent level would be to sacrifice the user to the investor interest. It is only by virtue of a greatly overstated capital structure, long in need of overhauling, that the company can demand fantastic earnings under the guise of "meeting bond interest."

The indulgence to the investor interest becomes still more marked when it is recalled that the uptown line, though making some contribution to bond interest, is unprofitable, with the result that the entire contribution to the income of the investors is exacted from the users of the downtown line. Not only must they pay a fare sufficient to yield an adequate return on the relatively small investment in the properties serving them but they are being called to assure such a return on the entire carrier investment, including the relatively large investment in the obsolescent uptown lines.

b. The user's interest

The impact of the fare increase on the users of the downtown line has already been shown to be inflationary in effect. Apart from this aspect

of the increase, however, it should be observed that it represents the culmination of a movement which has carried the price of the service from 6 cents just 6 years ago to $9\frac{1}{11}$ cents for the steadfast buyer of tokens and to 10 cents for the less faithful majority. This increase of from more than 50 percent to $66\frac{2}{3}$ percent over the 1938 fare level should be contrasted with the fact that the Bureau of Labor Statistics index of street-car fares and bus fares rose from its June 1939 base of 100 to the level in August 1943, of 101.1 and 101.8, respectively (Tr. 2452).

It should be recalled, moreover, that just before the Commission issued its June 8th order, it directed the suspension of the 10 percent increase in commutation fares which it had ordered in *Ex Parte 148*.

Street car fares are one of the five largest items among the 198 separate items (exclusive of rent) which enter into the Cost-of-Living Index of the Bureau of Labor Statistics.[94] When the Interstate Commerce Commission dismisses an increase of $6.76 per year for the steady buyer of tokens as negligible in its impact upon the public, it has demonstrated that it has lost touch with economic and social realities. Certainly it has failed to discharge its responsibility to the national stabilization policy.

---

[94] Bureau of Labor Statistics of the Department of Labor, document Serial No. R. 1156, March 15, 1940, Table 2, page 6; *id.* L. S. 43–5934, Table No. 1.

CONCLUSION

We submit that this Court should affirm the judgment of the statutory court, setting aside the orders and remanding the proceeding to the Commission for further hearing and reconsideration.

RICHARD H. FIELD,
General Counsel,
DAVID F. CAVERS,
Assistant General Counsel,
HARRY R. BOOTH,
Utilities Counsel,
ROBERT S. KEEBLER,
Attorney,
HERBERT SHARFMAN,
Attorney,
Office of Price Administration,
Washington, D. C.

AUTHORIZATION

I have authorized the filing of this brief.

CHARLES FAHY,
Solicitor General.

APPENDIX OF STATUTES AND EXECUTIVE ORDERS

Interstate Commerce Act, Sections 1 (1), 1 (5) (a), 15a (49 U. S. C., Secs. 1, 15, 15a):

SECTION 1 (1), *"Carriers subject to regulation.* The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for continuous carriage or shipment; * * *"

SECTION 1 (5) *"Just and reasonable charges required; classification of messages, and rates; exchange of services.* (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

SECTION 15a. *"Fair return for carriers.* (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto."

"(2) In the exercise of its power to prescribe just and reasonable rates the Com-

mission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. * * *"

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in

securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. II, § 942 (c)):

* * * *Provided,* That nothing in this Act shall be construed to authorize the regulation of * * * (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

That in order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided,* That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the

timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7:

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulations, price schedule, or order issued or effective under this Act.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Pre-

venting Inflation, and for Other Purposes," as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the development of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * *

Id., Title VI—General Provisions:

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

> The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal state, or municipal law in order to keep down the cost of living and effectuate the purposes of the stabilization program.

U. S. GOVERNMENT PRINTING OFFICE: 1944

APPENDIX

Excerpts from Transcript of Original Testimony before the Interstate Commerce Commission [1]

2032 Before the Interstate Commerce Commission

I. & S. Docket No. 4394

In the Matter of Passenger Fares of Hudson & Manhattan Railroad Company

Anteroom B,
Interstate Commerce Commission Bldg.,
Washington, D. C., Tuesday, September 28, 1943.

Met, pursuant to notice, at 10 o'clock a. m.

Before Irving L. Koch, Examiner.

Appearances: John E. Buck, Vice President and General Counsel, Hudson & Manhattan Railroad Company, 30 Church Street. Thomas A. Halleran, of Cravath, deGersdorff, Swaine & Wood, 15 Broad Street, New York City, appearing for Hudson & Manhattan Railroad Company. John F. Finerty, 120 Broadway, New York City, appearing for Hudson & Manhattan Railroad Company. Charles Hershenstein, Counsel to the Mayor, Jersey City, New Jersey. S. S. Eisen, 140 Cedar Street, New York City, appearing for all New Jersey protestants. Harry R. Booth, Federal Office Building No. 1, OPA, Washington, D. C., appearing for Economic Stabilization Director and Price Administrator.

* * * * * *

2034 Exam. Koch. So that there may be no misunderstanding as to the scope of this further hearing, I wish to make the following statement:

The order of the Commission of September 18, 1943, which reopened this proceeding provides, and I am now quoting:

"That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely

[1] Obvious errors in the transcript are indicated herein by brackets and corrections are interpolated in italics.

to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943;"

That wording is plain that the evidence at this further hearing must be directed solely to the propriety and lawfulness of such modifications as were made in the prior findings of the report of August 3.

Those modifications were from a finding that a
2035 nine-cent downtown fare had been justified, as made in the report of June 8, to a finding as made on August 3, that an alternative downtown fare of 11 tokens for $1 or a cash fare of a dime had been justified with the proviso that contemporaneously the same alternative basis shall be maintained on the uptown line.

In every other respect the prior findings of June 8 were affirmed.

Therefore, this further hearing under the Commission's order is restricted to evidence bearing upon the issue of whether or not those modifications in the prior finding, which had approved the downtown fare of 9 cents, shall stand.

We are not here retrying the lawfulness of the present 9-cent fare.

Mr. FINERTY. Or, I understand, Mr. Examiner, the present prescribed 9-cent fare.

Exam. KOCH. We are trying only whether or not there shall be a modification of the June 8 finding, as made in the August 3 report.

Mr. FINERTY. That is from nine to nine and eleven, and from nine to ten.

Exam. KOCH. Or something else.

Mr. FINERTY. Yes.

Mr. BOOTH. May I state for the record our exception to the ruling of the Examiner and of the Commission, if
2036 it is the ruling of the Commission, in limiting the scope of this hearing? We propose to test the exact nature of the limitation in the course of the proceeding, and in relation to specific evidence which may be offered or which may be requested.

Exam. KOCH. Very well. The record will show your exception.

Mr. EISEN. May I determine, please, whether or not the parties of this proceeding will be precluded from bringing

the record down to date insofar as it is stale and such procedure would preclude any finding with respect to revenues?

Exam. Koch. If that has a bearing upon the issue as I have described it, it will be permitted. We will see when we get to it the particular evidence that you have in mind.

* * * * *

2069 Exam. Koch. We are not trying the 8-cent fare.

Mr. Eisen. I am not talking about the 8-cent fare.

Mr. Finerty. We are not trying the 9-cent fare.

Mr. Eisen. I am trying to develop whether this company needs revenues in excess of that to be produced by a 9-cent fare, and I think that is directly in issue. If any-

2070 thing in excess of 9 cents is not to be predicated on revenue needs, then I would like to inquire upon what ground this case has been reopened.

Mr. Finerty. Mr. Examiner, may I answer that?

Our petition expressly predicated it on one fact only. We did not question the revenue of the Commission accorded us on the 9-cent fare, and we do not question it now. We have questioned our ability physically to collect the 9-cent fare, and get the revenue the Commission estimated we would get.

Mr. Brown's statement here is that with a 9 1/11th-cent fare for token use and a 10-cent cash fare will earn $81,000 less than the Commission's revenues estimated under the 9-cent fare.

I would be very glad, and I will ask Mr. Fritsch to show what that will be with a 5-percent diversion. It is obvious to me that it will still be, while not $81,000 less, it will still be less than the revenues which the Commission estimated.

We are not here and we are not prepared to try whether we need a 9 1/11th-cent fare to get the revenues the Commission has awarded.

* * * * *

Cross-examination of Walter F. Brown, Chairman of the Board, and President of the Hudson & Manhattan Railroad Company

* * * * *

2106 By Mr. Eisen:

Q. Now, was it not your position, Mr. Brown, that an increase in current divisions could only be obtained or sought if there were in effect a 10-cent fare?

A. No; I have never said that, but I have said that I thought we would be in a much stronger position to go to the Pennsylvania if we—if our local fare was substantially in excess of the present division that they were giving us, that there was reason for their being—for comparing the division with the local fare, and by that I don't mean that the local fares should be the maximum of the division by any means, but when the local fare is very much below the division I think we are not in very good shape.

2107 Q. Am I correct, then, in stating that it was not and is not your position that in your opinion 8.64 reflects the proper division on uptown traffic in the light of a 10-cent local fare, and that in order to obtain anything additional to 7.64 as a division on the downtown local fare that you would need a fare of 10 cents?

A. No, no; but I do think that the time to go to the Pennsylvania for increased divisions is when we get our own fares substantially where we think it ought ultimately to be.

* * * * *

2108 Examiner [LAW] *Koch*. Mr. Brown, what is the present situation with respect to this divisional matter?

The WITNESS. Well, there has been no change in the division matter.

* * * * *

2110 Mr. FINERTY. What I want to make clear is that this preliminary, tentative agreement has nothing to do with any basic change in the measure of divisions, but in asking this preliminary change in the method of accounting for divisions, you put the Pennsylvania Railroad on notice that you would subsequently take up with them the matter of increased divisions.

The WITNESS. Oh, yes, sir; and have outlined it, our theory of the whole matter.

Mr. FINERTY. But that matter was not approached—it is not beyond this preliminary step that is necessary if the tokens or alternative tokens and dime fare go into effect.

* * * * *

2111 Examiner [LAW] *Koch*. Mr. Brown, you had notified the Pennsylvania officials that you were expecting an increase in divisions?

The WITNESS. Yes, sir; and I specifically called their attention to the Commission's order and sent it to them.

Examiner [LAW] *Koch*. And you do expect if this alternative fare basis goes in, to have an increase in divisions?

The WITNESS. Well, I feel very confident that there will be an increase. If we can't agree, we shall try, of course, to agree with the Pennsylvania. If we can't agree I can see no alternative but to come to the Commission with it.

Exam. [LAW] *Koch*. But you expect to get an increase in those divisions?

The WITNESS. Yes, sir.

By Mr. EISEN:

Q. Do you expect an increase in the uptown divisions in the face of your proposed 9-cent fare uptown?

A. Yes, sir.

Q. Now, on page 1125 of the transcript, Mr. Brown, you said this:

2112 "Yes, sir, as will be later shown, petitioner is of the opinion that until this Commission authorizes a 10-cent fare on its downtown line, a serious obstacle will exist to obtaining any increase in the divisions with the Pennsylvania Railroad on the joint service between Newark and Hudson Terminal."

Now, would you say that the existence of a 9.1-cent fare will continue to impose a serious obstacle to obtaining any increase on your divisions in the downtown line?

A. I would say that the nearer we get to the 10 cents the easier it ought to be to work out something with the Pennsylvania, but I don't think it will be easy in any event.

Q. Now, on the uptown line: Do you think that the reduction in your local fare will result in a reduction of the uptown division?

A. No.

Q. Then the 10-cent figure will not have any bearing on or effect upon the divisional arrangement subsequently effected or that was effected in the past?

A. When I answered that question, my mind was focused on the straight 10-cent fare, and I was thinking of that.

Q. Well, you were giving reasons to justify the 10-cent fare.

A. I was thinking about the 10-cent fare, and had
2113 already dismissed from my mind any 9-cent fares because of the points that had been made.

That was authorized by Ex Parte 148 and we were thinking only of 10-cent fares.

Now we have a 9- and 11-cent fare and we perhaps stand, possibly, I hope for more of dimes than 10 percent.

Now, that creates another situation. If the Commission has directed us to take it up with the Pennsylvania and we have started to do it and we are going to do the very best job we can. If we fail we are going to come to the Commission and ask for an order.

Q. Now, have you negotiated with the Pennsylvania Railroad in June, when the Commission issued its decision authorizing a 9-cent fare on the downtown line or when thereafter did you commence negotiations?

A. When we got the decision of the 9-cent fare we all went to work at once to see how we could collect it, and our difficulty was in collecting it and we gave that our undivided attention, and after we came back to the Commission with our token solution of the problem, then I took up with the Pennsylvania the question of divisions but we did not, any of us, have any time to do anything until we were presented with a 9-cent fare that we could not collect.

Q. You consider it more important to get the in-
2114. crease from the downtown patron than any revenue from the Pennsylvania Railroad, didn't you?

A. No, that isn't so. We had not, but first things have to be done first.

Q. And you considered it more important than the downtown increase in fares?

A. No, I didn't consider it more important but I considered it essential we get that matter straightened out because we could not collect the 9-cent fare in cash.

* * * * *

By Mr. Booth:

2123 Q. Mr. Brown, you stated you had been associated with this company for a period of some ten or eleven years.

A. Yes, sir; I came to the company the 15th of March 1933.

Q. Did you during this period, or—could you sell any tokens as part of its fare structure during that period?

A. Never.

* * * * *

2123 Q. Well, during none of that time, Mr. Brown, were you associated with the development of a fare structure for a local transportation company, which included
2124 tokens, is that correct?

A. Well, I was counsel for the Toledo County Traction Company for a good many years. They did not use tokens but I was very familiar with the whole fare operation on streetcars.

Q. Well, while you were counsel for the company, it was part of your duty to assist the management of the company in the development of a fare structure?

A. Well, we had controversies over franchises and fares, of various kinds; yes, sir.

Q. Well, did you participate in the development of a fare structure, Mr. Brown?

A. Well, I—yes, sir; I was associated with the man in the company that had direct charge of that feature of the work.

Q. But the company did not sell any tokens while you were there?

A. They never sold any tokens, no.

* * * * *

2125 Q. Now, Mr. Brown, at the time you prepared this affidavit, annexed to your petition of June 8, I believe you stated that you had gone into this question of token fares with your associates?

A. Yes, sir; we considered it very carefully.

Q. And did you at that time— You stated you considered it carefully, among yourselves, is that correct?

A. Yes, sir, very.

Q. That is, you discussed it with whom?

A. And with our—with some of our directors who have had experience in the utility field.

Q. And did you have a written report submitted to you on this question prior to July?

A. A written report?

Q. Yes, sir.

A. Well, I don't remember any written report.

Q. You saw none—you had none?

2126 A. You see, we have interoffice memoranda that go back and forth. Sometimes I ask some of our people to send in memoranda and sometimes I do it myself.

Q. This is based very largely upon conversations and analyses that were made and, as a result of that you arrived at this common-sense judgment that you referred to previously that——

A. Well, we discussed the matter with representatives of the American Transit Association, that is an association

composed of various utilities, practically all of those in the country, many of those using tokens.

Q. Yes, sir; but Mr. Brown, as of July 8th, you had no written reports that were prepared for you dealing expressly with the problem of the token fare structure to be presented to the Interstate Commerce Commission for its consideration in connection with this affidavit of July 8th?

A. Well, we had a lot of information from various sources, with the experience they had had with tokens at various times, and sold at different prices under different conditions in different parts of the country.

Mr. FINERTY. Well, I think, Mr. Brown, what Mr. Booth is shooting at, did you have any OPA questionnaires or anything like that?

Mr. Booth. No. I move that be stricken from the record.

Exam. [LAW] *Koch*. Take it off.

2127 Mr. BOOTH. I ask that I be permitted to examine the witness, to develop some facts on this question.

Exam. [LAW] *Koch*. Go ahead.

Mr. BOOTH. Which we consider to be very material.

By Mr. BOOTH:

Q. Now, who did you discuss the matter with in the American Transit Association? Mr. Gordon?

A. Let me see. It seems to me it was Mr. Gordon. Who was—what is the name of the head man in the Transit Commission?

Mr. FINERTY: Mr. Hecker?

The WITNESS: Mr. Hecker was the man.

By Mr. BOOTH:

Q. Who is Mr. Hecker?

A. I think he is the managing director of the thing. He and another man both came down to see me.

Q. What was the other man's name, Stevenson?

A. No, it was not Stevenson.

Q. They came over to you and talked to you about the matter?

A. First Mr. Van Geison went up to see them in New York and had a long talk with them and got some information and then they came down to see me and brought down a lot of data, material that they had collected.

Q. Did you consult the Interstate Commerce Commission before you prepared this affidavit?

A. Well, I don't know just what you mean by that.

2128 Q. Well, does the Interstate Commerce Commission have any local transportation experts or people who might be experts in the development of token fare structures?

A. Why, I did not ask any advice from them.

Q. You did not?

A. No.

Q. The American Transit Association is an association of local transportation companies in this country, is that correct?

A. I think so, yes, sir.

Q. And now may I direct your attention to this volume which I told in my hand, which is headed, "American Transit Association, Affiliated Organizations, Proceedings, 1937." Have you seen this volume?

A. No, I have never seen it.

Q. Have any of the men called your attention to it, with whom you became or were associated in connection with this problem?

A. No; I do not believe I ever heard of it.

Q. All right. Did you examine this report? I refer you specifically to page 928 of the 1937 proceedings, the Report of the Committee on Fare Structures, and ask you whether you read that report?

A. I told you I have never seen the book.

2129 Q. Well, it might be that you have seen this report, Mr. Brown.

A. No; I have never seen the report.

Q. You have never seen the Report of the Committee on Fare Structures for 1937 of the American Transit Association?

A. Well, I don't think so.

Q. All right. Well, you can look at it.

A. Yes, sir.

Q. And I will ask you whether you have read it.

A. Of course, the Commission—the Transit Association sent me quite a lot of printed material.

Q. Well, now, just look at that——

A. I undertook to go through it but they did not send me any book like this.

Q. Well, let me ask you whether you have seen this report under any other form?

A. Well, I would say that some of the points that are made here, Mr. Hecker and his associates made with me in speaking of the analysis of factors affecting riding habits and things of that kind.

Q. Well, did you read that report, Mr. Brown?

A. No, I don't think I have ever read the report.

Q. I would like to have marked for identification, if
2130 the Examiner please this document, as Exhibit [F–42] *F–142* which is a copy—an exact copy of the Report of the Committee on Fare Structures, and which is taken from this volume.

A. That is in the year 1937.

Mr. EISEN. Is that volume a public document, Mr. Booth?

Mr. BOOTH. Yes, sir; the original volume is to be found in the Library of the Interstate Commerce Commission.

Mr. FINERTY. Mr. Booth, I have no objection to your asking Mr. Brown to say whether he has ever seen this report or not and he says he has not, but if the purpose of identification is to show he has not seen something I think it unnecessary.

Mr. BOOTH. Well, I will call a witness to identify this report. This is a report which deals with the use of tokens, token fares, and I should think that perhaps the Commission might like to have it in this record, of the American Transit Association.

Exam. [LAW] *Koch*. What is the purpose you have in mind?

Mr. BOOTH. It is to be used to give the Commission facts on the question of the probable use of purchase of tokens in connection with the order of August 3. It bears directly upon the affidavit made by Mr. Brown, and upon the acceptance by the Commission of Mr. Brown's affidavit.

Exam. [LAW] *Koch*. Then your purpose is that this shall shall have a bearing upon the feasibility of the use of tokens?

2131 Mr. BOOTH. Yes, sir, and certainly in this case.

Exam. [LAW] *Koch*. All right.

Mr. FINERTY. Now, as I understand you——

Mr. BOOTH. Well, the feasibility of use and the extent to which it would be used. Primarily the extent to which tokens would be purchased under the order of August 3, and the affidavit made by Mr. Brown, which was the basis upon which the Commission entered its order.

Exam. [LAW] *Koch*. And this will have a bearing upon the 9–10 ratio.

Mr. BOOTH. Very much so, in my judgment it is an exceedingly authoritative statement on that point.

Mr. FINERTY. Now, Mr. Examiner, if you desire to receive this, I merely want to record a formal objection to what is perfectly apparent, that it is absolutely inadmissible.

I want to examine Mr. Brown voir dire, and ask him if the H. & M. is a member of the American Transit Association?

The WITNESS. No.

Mr. FINERTY. Was it a member in 1937 of that Association?

The WITNESS. No.

Mr. FINERTY. I want to call your attention, Mr.
2132 Examiner, to the fact that the H. & M. Railway Company is not mentioned in the report; that none of the statistics in the report deal with the Hudson & Manhattan Railroad Company, and certainly none of them deal with traffic conditions between Jersey City and Manhattan.

If you want to accept— We have no desire to keep you from anything that might be informative, Mr. Examiner. If you desire under those circumstances to accept the Exhibit, I think its value will be destroyed on redirect examination, as far as this case is concerned, but if you desire to accept it I will be very glad to make a formal objection.

Examiner [LAW] *Koch*. Of course technically this is cross-examination, and you are making Mr. Brown your own witness now if you are going to take this in.

Mr. FINERTY. Certainly.

Mr. BOOTH. I am going to present this, and have it sponsored by a witness of my own. It is merely being identified at this time and I merely asked Mr. Brown whether he had read or had examined it.

Mr. FINERTY. If that is the only purpose at this time, Mr. Brown has answered he has not and the document has not been offered so I take it.——

Mr. BOOTH. I assume you will have ample time.

* * * * * *

2160 Q. Mr. Brown, assuming it to be true that the report of the Committee on Fare Structures that I have referred you to and had marked as Exhibit F–142 for identification, show that with a token investment of a dollar, which would purchase 11 tokens, with a differential of 10 percent between the cash fare and the token fare, that the average use of tokens under those circumstances would be about 34

percent, that that was true in the case of your company, would you make more or less money than you have shown in your affidavit to the Commission?

Mr. FINERTY. Will you read that question, please?

Exam. KOCH. Off the record.

(Discussion off the record.)

Exam. KOCH. On the record.

Mr. BOOTH. You are instructing the witness not to reply?

Exam. KOCH. Yes.

2161 Mr. FINERTY. He is sustaining my objection on the grounds that the answer is self evident.

* * * * *

2071 By Mr. EISEN:

Q. Now, Mr. Brown, your figure, as I understand it, of $81,450 less under the alternative basis, and the

2072 figure of $455,696 additional revenue that you would receive on the downtown line under the alternative basis, is predicated upon a 90 percent usage of the token; is that right?

A. Yes.

Q. Now, will you please tell us how you arrived at that 90 percent figure?

A. Well, by discussing it with transportation men, and from our own observations of the character of traffic we have, we assume—I think we have reason to justify it, that 90 percent of our patrons are regular patrons that are commuters, 90 percent are regular people, and they are people who are able to buy a dollar's worth of tokens. They are thrifty, careful people who travel back and forth every day, and we assumed that, and still believe that that is a sound figure.

Q. Have you made any investigations of the usage of tokens by other transportation facilities?

A. Yes. We have made quite—we have acquired some information about it, but we do not find any other company that is situated just as ours is.

Q. Do you find any other company that uses tokens any place in the country that can report anything like 90 percent?

A. Well, we don't find any that is situated like ours at all or that sells them in that way.

2073 Q. Do you find any that will report as high as 50 percent?

A. Oh, yes.

Q. Can you give us reference to one or two, please?

A. No; I can't now, but I discussed the matter very fully with representatives of the American Transit Association. we believe that the 10 and 90 percent is a sound figure.

Q. You believe that 100 percent of your regular patrons will buy tokens?

A. Yes.

* * * * *

2144 By Mr. BOOTH:

Q. Well, Mr. Brown, when you testified in the earlier stages of this case, you asked the Commission to approve an annual charge of approximately $240,000 which was intended to represent a War Damage Reserve, or War Contingency Reserve, is that correct?

A. Well, I stated——

Mr. FINERTY. Mr. Examiner, I am going to object. This is going to the question of the basic report.

Exam. KOCH. Does this change you propose to make in fares here make any difference in that?

The WITNESS. No, sir; it is not a matter there should be any mystery about.

2145 Mr. FINERTY. Isn't that——

By Exam. KOCH:

Q. Does it make any difference at all whether the 9 cent fare is in effect or 8 cent fare?

A. Would not make any difference at all.

Exam. KOCH. Objection sustained.

Mr. BOOTH. May I make a statement then, and ask the Examiner to present it to the Commission, the request of the Office of Economic Stabilization and the Office of Price Administration, whom I represent in this proceeding?

We [ask] *asked* the Commission, in our reply to the company's petition for reconsideration of July 8, to reconsider its previous modification of the original order in this case, and to consider the return of the petitioner's downtown fares to the original level of 8 cents.

By the Commission's order of August 3, this Commission has authorized the company to increase its fares to a very substantial number of its users, 25 percent, as contrasted with the fares in existence on September 15, 1942.

I refer to that date because under the Act of Congress, by the Act of October 2, which is a further Act by Congress for the purpose of stabilizing prices and the cost of living necessary for the successful prosecution of the war, Congress in-

tended that all prices, including utility and common carrier rates, be stabilized in so far as practicable on that date.

2146 We feel that it has not been shown in this record that the increase is necessary, the increase of any kind from a revenue point of view, considering the company's rights, either in view of the economic conditions or under the Interstate Commerce Act.

The record in this case was closed over a year ago. It was closed on September 19. There has been a change in the company's [output] *operation*——

Mr. FINERTY. That is not correct, that it was closed September 19. The record was reopened to receive statistics and up to and including December 31, and oral argument thereafter.

Mr. BOOTH. Well, there was a very short table put into the record.

Mr. FINERTY. Everything you asked was put in.

Mr. EISEN. Everything I asked.

Mr. BOOTH. May I proceed with my statement without interruption by counsel for the company?

We think there has been a change in circumstances affecting the operations of the company, affecting their right to an increase in fares over and above the fares in effect on September 15, 1942.

I indicated this morning that I was excepting to the ruling of the Commission limiting the purposes for which this

2147 reopened proceeding was being held, and one of the things that I would like to go into is the necessity of the company's annual charge for $240,000 for War Damage Reserve. We would show——

Exam. KOCH. Just a minute.

Mr. BOOTH. If we were permitted to show——

Exam. KOCH. Just a minute. Of course if that were reopened as far as you want that to be reopened, the Commission would have to modify its order.

Mr. BOOTH. That is right.

Exam. KOCH. Before that could be done you would have to file a petition asking therefor.

Mr. BOOTH. We propose to submit it in writing.

Exam. KOCH. You can submit that at the time you file your brief in response to this hearing.

Mr. EISEN. May I suggest, Mr. Examiner, that the Commission's report of August 3 specifically refers to the [$230,000] *$240,000* a year War Contingency Reserve?

Exam. KOCH. That has to do only with respect to the six months limitation after the war. It was referred to for another reason.

Mr. BOOTH. We don't know why the reason referred to in its order——

Exam. KOCH. I am just telling you why it was put in the report. Now, I don't know what was in the mind of the Commission.

2148 Mr. EISEN. Mr. Examiner, may I also suggest in connection with this point that that figure of $240,000 has to do materially with the Hudson & Manhattan's operating costs or alleged operating costs, and the operating costs go directly to the revenue, and the revenue goes directly to the justification for any rate that would result from this proceeding.

Exam. KOCH. No. Now, if that is true, the whole case is opened. Of course, that must be admitted. And the whole case is not opened. What is the purpose of the words "solely" and "modify" in the order of September 15 if that is true? It isn't just so. Therefore, the Examiner must rule that such evidence will not be received here.

Now, if you want to file a petition asking the Commission to reopen it all the way, that is your privilege.

Mr. EISEN. I am not talking about reopening; I am talking about the 9-cent fare and the 9.1- and the 10-cent fare. It seems to me the Commission would have to make some findings in connection with the prescription of a 9.1- or 10-cent fare in connection herewith. Now, if we can establish——

Mr. FINERTY. That evidence has already been offered.

Mr. EISEN. That the protestants operating expenses are inflated by an amount equivalent to all or substantial portion of the $240,000 which Mr. Booth is prepared to do, and

2149 has witnesses to establish, I think that has a very material effect upon the revenue situation which the Commission must give consideration to.

Now, however, if we are to be precluded from going into the revenues insofar as they affect the 9.1- or the 10-cent fare or the 9-cent fare, they apply equally with respect to those fares as they do to any other fare.

Exam. KOCH. We will receive testimony here so far as revenue is concerned only with respect to the difference in revenue resulting between the 9-cent fare on the one hand and the proposal here on the other.

Mr. EISEN. And not what revenues the carrier needs or anything of that sort; am I correct, Mr. Examiner?

Exam. KOCH. That is correct.

Mr. BOOTH. May I state then for the record that if we were given an opportunity to go into this item we would show either because of change of conditions or because of other factors that there would be a very serious question as to whether the Commission should allow it.

Exam. KOCH. You file your petition and we will see what the Commission does about it.

Mr. EISEN. Inasmuch as you have made the ruling, Mr. Examiner, I make an offer of proof to the effect that I have a witness here that was ready, able and willing and
2150 would have testified in due time, that the situation of the Hudson & Manhattan Railroad for the first six months of this year as such, that it reflects an increase of 30 percent in patronage over 1941, the corresponding period of 1941, that the H. & M. Railroad has testified that under existing fares of 9 and 10 cents a 30-percent increase in patronage would be required to enable them to meet interest on their bonded indebtedness, and that therefore as reflected by the first six months of this year, there was no need, insofar as revenue is concerned, for any prescription of any rate in excess of 8 cents.

Mr. FINERTY. Just so that injustice won't be done to the Commission in connection with the President's "hold the line" order, I think Mr. Booth should concede that when the Commission allowed 1/11th of a cent advance downtown, and—or a 10/11ths of a cent for uptown passengers, it coincidentally reduced the uptown fare by the same order 10/11ths of a cent.

Mr. BOOTH. We don't agree with your assumption, Mr. Finerty, that only 10 percent of the downtown customers would pay the 10-cent fare.

Mr. FINERTY. Well, we have not finished with that yet, Mr. Booth.

Mr. BOOTH. Well, that is all right with me, too, if you have any proof, but we will make our own position clear in this case. We do not ask for your help.

2151 By Mr. BOOTH:

Q. Mr. Brown——

Mr. BOOTH. I take it, then, Mr. Examiner, that if I were to question the witness further on this $240,000 that you would sustain objections to the testimony——

Exam. KOCH. That is correct.

Mr. BOOTH. By the company's president.

Exam. KOCH. That is correct.

* * * * *

Cross-examination of JOHN J. FRITSCH, Comptroller, Hudson & Manhattan Railroad Company.

* * * * *

2215 By Mr. EISEN:

Q. Mr. Fritsch, do you have any figures to indicate what the additional revenue accrued to the joint service as a result of the Ex Parte 148 increase?

Mr. FINERTY. I object; divisions again.

Mr. EISEN. No; it is not divisions. All I want to know is what the increase amounts to as a result of 148 at the current time under joint revenues.

Mr. FINERTY. That has nothing whatever to do with local fares on the uptown and downtown line. The question is the only one at issue here, Mr. Examiner.

Exam. KOCH. Objection sustained.

By Mr. EISEN:

Q. Mr. Fritsch, it was stated as being the position of the Hudson & Manhattan Railroad that a 30-percent increase in patronage in 1943 over 1941 at the existing fares of 8 and 10 cents would be required in order to meet current bonded indebtedness. Would that still be a correct statement as you understand it?

Mr. FINERTY. Mr. Examiner, I again object. You sustained an objection to that question to Mr. Brown, I remember.

Exam. KOCH. Objection sustained.

Mr. FINERTY. Off the record.

2216 Exam. KOCH. Off the record.

(Discussion off the record.)

* * * * *

2216 By Mr. EISEN:

Q. Are you familiar with how much of the $20,000 monthly War Contingency Reserve has been expended this year for the purposes of war contingencies safeguards?

Mr. FINERTY. Well, I object as not within the scope of the reopened hearing, as the Examiner pointed out. There has been no change in the War Contingency Reserve, but I think I am correct, Mr. Fritsch, in this respect, that perhaps we misled the Commission originally. We have not only spent

$20,000 out of this War Contingency Reserve; we have charged $20,000 each month to that reserve. Is that correct, Mr. Fritsch?

The WITNESS. We have credited $20,000 each month.

Mr. FINERTY. We have credited $20,000 each month from operating expenses to that reserve.

Exam. KOCH. Well, but have you been using it?

2217 Mr. FINERTY. Yes.

Mr. EISEN. Well, that is my question. I would like the witness to answer that.

The WITNESS. None of it has been expended to date.

By Mr. EISEN:

Q. So that ——

Mr. FINERTY. Wait a second, Mr. Fritsch.

Mr. EISEN. Well, I object.

Mr. FINERTY. I am sorry.

Exam. KOCH. Didn't you take $20,000 out of that for that wreck?

Mr. FINERTY. Yes; you charged $120,000 of that reserve to the wreck, didn't you?

The WITNESS. Probably——

Exam. KOCH. This is an accounting matter which is a little difficult to explain is it not?

The WITNESS. Yes. Well, we have charged to the reserve approximately $125,000, but we started to credit this reserve in order to get that money back into the fund. We started last September to replace that and anything additional that we may need subsequently.

In other words, there has been a slight increase in the reserve, the difference between $240,000 and $125,000, which has been expended. That has been the increase in the reserve since I have been there in the last year.

Exam. KOCH. The difference between $125,000 and $240,000?

2218 The WITNESS. Yes, or approximately $115,000.

Mr. FINERTY. Then the correct answer, Mr. Fritsch, is that $125,000 has been expended out of the reserve?

The WITNESS. That is right.

By Mr. EISEN:

Q. Now, the reserve has accumulated $180,000 this year, $20,000 a month for nine months. That is $180,000; is that correct?

A. This year, yes; that is true.

Q. Now how much has been expended of that $180,000 for this year?

A. Nothing has been expended this year.

Q. Nothing?

A. Nothing.

Q. Now, that $20,000 a month is being charged to operating expenses?

A. That is true.

Q. Don't you believe that that amount can be reduced, and the operating expenses accordingly reduced?

A. That would be something over which I would have no control.

Q. Now, the protestants estimated that the Ex Parte 148 increase in joint fares would have amounted to or did actually amount to $400,000 in 1942. Do you know whether that figure is substantially correct or otherwise?

Mr. FINERTY. May I hear that question?

2219 Mr. Finerty. Well, the same objection to this whole line of questioning and an additional objection because the Examiner ruled out my question.

Exam. [LAW] *Koch.* The same ruling.

By Mr. EISEN:

Q. Have you made any studies to determine how much additional revenue can be obtained from an increase in a five cent division in the joint fare whereby the Hudson & Manhattan operates between Jersey City and downtown New York, particularly in view of the admonition of the Commission in Ex Parte 74?

Mr. FINERTY. The same objection, coupled with Mr. Brown's statement that we are exploring that with the Pennsylvania Railroad.

Exam. LAW. Same ruling.

Off the record.

(Discussion off the record.)

Exam. LAW. On the record.

Mr. EISEN. Have you made or prepared any exhibits or will any exhibits be prepared, Mr. Finerty, showing the present revenue situation of the Hudson & Manhattan Railroad?

Mr. FINERTY. There will not.

By Mr. EISEN:

Q. Have you made any studies to determine whether the H. & M. will suffer any deficit during 1943 if it employed

as its basic figures 9 cents for the local downtown
2220 fare and 10 cents for the local uptown fare?

Mr. FINERTY. The same objection, and the added objection that this whole hearing in the Commission's report is based on the assumption that we can't collect 9 cents.

Exam. [LAW] *Koch*. Same ruling.

By Mr. EISEN:

Q. Have you made any studies to determine what the 1943 revenue results would be—have you made any studies, Mr. Fritsch, to determine whether or not the alleged increase shown in your Exhibit No. F-150 will provide sufficient monies to meet bonded indebtedness or otherwise?

Mr. FINERTY. Same objection.

Exam. [LAW] *Koch*. The same ruling.

By Mr. EISEN:

Q. Now, Mr. Fritsch——

Mr. EISEN. This is under the Commission's proposed basis. Do you know, Mr. Examiner, this is under the Commission's proposed basis, my question was.

Exam. [LAW] *Koch*. Yes, sir; but it has nothing to do with the modifications made to the 9-cent fare finding.

Mr. EISEN. The modification of the 9-cent fare is not in any way, shape or form related to revenue; is that correct?

Exam. [LAW] *Koch*. It is related to revenue only and to this extent, as to whether or not there will be any more or less revenue on the proposed basis than on the 9-cent fare, if it could be collected.

2221 Mr. EISEN. And we are not concerned with whether or not the proposed basis will produce revenues over and above those needed by the carrier.

Exam. [LAW] *Koch*. Well, of course, it is self-evident from the statements made here by Mr. Brown, that if that testimony can be accepted at its face value, the H. & M. receives less under the proposed basis than under the 9-cent fare, if it could be collected provided, of course, that there would be the same basis uptown as downtown.

Mr. EISEN. Yes, Mr. Examiner, but there is nothing in the record to show what the operating expense of the H. & M. are or any of a multitude of matters for the year 1943 and that is what I am trying to develop from this witness.

Without having those figures in, neither the Commission nor we can make any computation.

I have asked him if he has made any, and I was ruled out of order in trying to develop whether he has made any such studies, and what the results are.

Mr. FINERTY. Well, I understand, Mr. Examiner, that it comes under your general ruling, and I would also like to suggest that would only become pertinent if they filed a complaint against your 9-cent—I mean a petition for rehearing under your 9-cent fare.

Exam. [LAW] *Koch*. That seems to be so.

2222 Mr. EISEN. I am not arguing, Mr. Examiner; I am merely trying to get the record clear.

Exam. KOCH. Well, the ruling is the same.

Mr. EISEN. Yes, I understand; I just wanted to get it clear.

By Mr. EISEN:

Q. Now, do you know what *is* the present market value of your adjustment [in combines] *income* bonds?

Mr. FINERTY. Objection.

Exam. KOCH. Sustained.

* * * * * *

By Mr. BOOTH:

Q. Mr. Fritsch, where did you get this 90 percent figure that constitutes the basis for your Exhibits 147 to 150?

A. That is the basis that was given to me in order that I might prepare these figures.

Q. Who gave it to you, Mr. Brown?

A. It was arrived at at a conference with Mr. Brown and the attorneys.

Q. Who participated in this conference, the attorneys and Mr. Brown?

2223 A. That is all that I know of.

Q. Mr. Finerty?

A. No.

Q. Mr. Buck?

A. Mr. Buck.

Q. You had nothing to do with the estimate of 90 percent yourself?

A. No.

Q. You are not sponsoring that 90 percent figure?

A. No.

Q. And you have never participated in the preparation of any fare or token structure in the course of your experience in your career?

A. No.

Mr. FINERTY. I might state to obviate any examination on that, Mr. Fritsch is not offered as an expert except for anything but as an accountant.

Mr. BOOTH. I just wanted to clear it up that he was not sponsoring the 90-percent figure, and I would like to ask him some questions on accounting, if the record is broad enough to permit that type of inquiry.

By Mr. BOOTH:

Q. Now, in view of the fact that he has given some testimony on that $240,000, I feel it necessary to ask questions on that.

Let me call your attention to a statement of your at-
2224 torney, Mr. Finerty, in oral argument, on page 20. He stated as follows:

"In connection with the $240,000"—he said "that the annual charge"—this is in quotes "is a contribution to"—and this is in quotes "a war contingency reserve," in quotes "that war contingency reserve of necessity increases [and] *the* self insurance by the petitioner to meet war casualties which may very well occur and which might otherwise cripple petitioner." Is that a correct statement of the purpose of that reserve?

A. Well, under our system of accounting, there could be no such thing as a contingency reserve. The I. C. C. has no such thing as a contingency reserve, but we could create, through insurance-expense accounts a reserve to which could be charged such items as guarding tunnels at night and any increased insurance that might be taken out because of the contingency.

Mr. FINERTY. It would include self insurance?

The WITNESS. Surely. We could carry our own insurance to a certain extent.

By Mr. BOOTH:

Q. Well, may I ask you this: Has the company insured itself with the War Damage Corporation for war casualties or similar casualties that might occur as a result of the war?

2225 A. We carry some insurance of the exact extent I do not know, because I do not have charge of the insurance. But the Board felt, as I understand it, that they needed a little more protection and they decided that they would keep the funds themselves and create this reserve, rather than spend it and pay some insurance company for it.

Q. Well, the purpose of it is to meet war casualties; is that correct, and war damages?

A. Well, that I could not say, because it was a board ruling that instructed me to put the reserve on the books. I do not know what was behind it.

Q. Well, was there a minute of the board of directors adopted in connection with it?

A. There was a resolution adopted.

Q. Could you present it and make it available for the purpose of the record?

A. I have not a copy of it; no, sir.

Mr. Booth. I ask that the witness procure a copy and present it for the record.

Mr. Finerty. Well now, this comes of being good-natured, Mr. Examiner. I did not object to this whole thing strenuously at the time, because there was a question you wanted answered.

Exam. Koch. I have been wondering when you were going to wake up.

2226 Mr. Booth. Well, it either ought to go out or it ought to go in. I am willing to have the Examiner throw it out and we will stand on our exception.

Exam. Koch. I think we had better stop.

Mr. Booth. If I understand we are not to be permitted to go into this phase of it.

Exam. Koch. Right.

Mr. Booth. We will take exception to the Examiner's ruling.

* * * * *

2227 By Mr. Booth:

Q. Mr. Fritsch, were you instructed to prepare some exhibits or tabulations showing the income and expenses of the company both as to its railroad operations and as to its overall operations for the period ending August 31, 1943, or the latest available date?

Mr. Finerty. Mr. Examiner, I will answer that question. Mr. Fritsch was instructed to have available, if the Commission should so require, a list of nine statements which I show you, asked by Mr. Booth, all having to do with the overall question of the reasonableness of the revenues under the nine-cent fare and all having to do with exactly the subjects which Mr. Eisen has been examining, and which you have excluded.

We have furnished the tenth number on that which
2228 has not to do with revenues but has to do with the traffic, and is covered by our Exhibits 147 to 150, inclusive. The rest of it, unless directed by the Commission, we will not furnish.

Exam. Koch. Very well.

Mr. Booth. I understand, Mr. Finerty, that Mr. Koch at our request asked you for this information and you declined to give it to him.

Mr. Finerty. With the exception of No. 10, which was furnished.

Mr. Booth. That is right. Could you give that to the reporter and let him read it?

Mr. Finerty. Have you got a copy of it?

Mr. Booth. May we give a copy to the reporter tomorrow? I understand that the Commission will not comply at this time that our request that that data be presented and incorporated in the record.

Exam. Koch. That is the Examiner's ruling.

* * * * * *

2229 Mr. Finerty. Yes.

Mr. Booth. Were the exhibits offered in evidence?

Mr. Booth. Were they received in evidense?

Exam. Koch. Not yet.

Mr. Finerty. I now renew the offer.

Mr. Booth. I want to object unless the evidence is as to the income and expenses of the company for the same period as also presented.

Exam. Koch. The objection is overruled, and the Exhibits 147 to 150 were received.

* * * * * *

September 29, 1943.

* * * * * *

2266 Mr. Hershenstein. If Your Honor please, I am going to have Mr. Booth and Mr. Eisen carry on. I must leave.

But in reading the record, I find that an objection was made by Mr. Booth at the outset and so that the record may show that the objection applies to all the protestants and to Jersey City, I want to state for the resord, on behalf of Jersey City, we vehemently protest against the circumscribing of

2267 the hearings by the order of the Commission, and the limitation put upon this hearing by the Commission.

Of course you have no power other than to carry out the instructions of the Commission, but we say, if Your Honor please, that it has become apparent that the Hudson and Manhattan Railroad Company is attempting by this modification to obtain increased revenues by an increased fare.

On the surface it is an application for a modification simply because they cannot accomodate their coin boxes to a collection of a nine-cent fare, but it seems to me quite clear that Mr. Finerty in direct examination of his witnesses, indicated that what they are really seeking was the additional revenue which they think they are entitled to. That being so, we say that it is improper for the Commission to have made the order which it did make under date of September 18, 1943, not only by limiting the scope of the present hearing, in the language of the Commission:

"that such further hearing is for the purpose of permitting any party to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in the report of August 3, 1943"

without giving us an opportunity of meeting everything which has been proposed by the railroad company, in
2268 the way of demonstrating quite clearly that they have received and earned an increased revenue to meet what they complained about when the Commission made its order of June 8, 1943.

We further, if Your Honor please, respectfully object to the limitation made by the Commission that there shall be no argument before the Commission, that the matter should be heard by Your Honor upon oral argument which Your Honor has ——

Exam. KOCH. Mr. Hershenstein, by the authority of Commissioner Porter, I am affording the opportunity to the parties, I intended to do this at the close of the testimony, but I will do it now, an opportunity to the parties to elect whether to orally argue this matter before me at the close of the proceedings here or to file briefs.

Mr. HERSHENSTEIN. Well, your Honor ——

Exam. KOCH. Of course the briefs would include argument which you are referring to.

MR. HERSHENSTEIN. I understand.

Mr. FINERTY. Let me make this clear, Mr. Hershenstein: The briefs are not to be filed with the Examiner. They are to be filed with the Commission.

Mr. HERSHENSTEIN. I see.

Well, I still say that in an important matter as this has now turned out to be, that the Commission should not deviate from the rule which has prevailed in all these fare
2269 cases, and in all these suspension cases particularly, to give us an opportunity to argue the matter orally before the entire Commission. That is a matter for them to determine.

Exam. KOCH. I wish the record to show quite clearly why I say, by authority of Commissioner Porter.

This proceeding is on his personal docket, and this being an administrative matter, the Commission has given to him the authority to say whether or not there shall be briefs in this proceeding.

Mr. HERSHENSTEIN. I understand, sir, Your Honor's position, perfectly. Thank you.

* * * * *

Mr. EISEN. Just so that we may clear up this matter
2270 of motions at this time, on behalf of all New Jersey protestants whom I represent in this proceeding, including the city of Jersey City, I want to adopt on their behalf the motions heretofore made by Mr. Booth and Mr. Hershenstein.

Now, on behalf of all protestants, the New Jersey protestants, I want to make this further objection to the restriction of the Commission's order.

In the first place, it prevents us from bringing a stale record, which we contend is stale under the changing circumstances as they are currently occurring, up to date or down to date.

In the second place, according to my reading of the Commission's order—I may be mistaken—but according to what I can deduct therefrom, it would appear to me that the Commission has predicated in its August 3d report and apparently seeks justification therefor, the prescription of a fare predicated on an alleged carrier disability.

Furthermore, it would appear that one of the grounds for justification of the prescription of a higher fare than that heretofore preseribed is that there will be a reduction made on some other branch.

Now, in my opinion at least, it is contrary to the powers of the Commission under the Act and contrary to precedent for the Commission to prescribe a rate predicated on carrier disability. It is a fact that every passenger is entitled to a reasonable fare per se on his own line, regardless of
2271 what happens to other branches and other adjustments and prescription of the Commission's order and restrictions and limitations imposed by the order of September 18 assigning this hearing would appear to me to deprive us of very fundamental rights and sets up matters which are entirely erroneous, it would seem, and contrary to law.

Exam. Koch. Now, you said something a while ago about motions. I heard no motion. If you regard those as motions which you have just made, the time to make them is in the brief or in conjunction with the brief.

I assume that you gentlemen do not expect me to take the motions you have made on this record and present them to the Commission.

Mr. Booth. We will file a motion in writing, as far as the intervenors, the Office of Economic Stabilization and the Office of Price Administration.

Mr. Eisen. The purpose of making the statement I make and that the other parties made, I believe was precedent to making a motion that the Commission modify the scope of its order of September 18, and afford all parties a requisite opportunity to submit evidence having to do directly with the issues involved in the I. & S. case. I do not think it necessary to go into those, and an opportunity to bring the record
2272 down to date, and I ask the Examiner to submit that motion to the Commission, which might result in a further reopening of the proceeding before ultimate disposition hereof.

Exam. Koch. Now, Mr. Eisen, if I consented to do that we would have an argument. A while ago I gave you the alternative of an argument before this Commission or the filing of briefs.

Mr. Eisen. An argument before yourself.

Exam. Koch. Of the filing of briefs, which of course will be presented to the Commission.

Now, you know the rules of practice before this Commission, and the rules do not provide for any procedure like you have just indicated here.

I want to point out that the proper way to present this is like the OPA just indicated they are going to do. That is,

if you desire to present a motion like you have just indicated here you present it in a formal way so it can be separately presented with the arguments pro and con and can be responded to by the Hudson and Manhattan Railroad Company.

Mr. BOOTH. With respect to the suggestion made earlier, namely, either to argue the matter or to present a brief, we think the matter is of sufficient importance, in connection with the government's program to keep down cost of living, that the matter should be presented by oral argument to
2273 the full Commission.

Exam. KOCH. You will have a chance to do that. That is, you will have a chance to argue, in written form, in the brief.

* * * * *

QUESTIONING OF JOHN C. VAN GEISEN, GENERAL SUPERINTENDENT OF THE HUDSON & MANHATTAN RAILROAD COMPANY

* * * * *

2399 Mr. FINERTY. Mr. Van Geisen, as I understand it, you estimate that 90 percent of your passengers will use tokens and 10 percent will pay cash fares. Is that correct?

The WITNESS. I estimated what, Mr. Finerty?

Mr. FINERTY. I understand that the estimate of the Hudson & Manhattan Railroad Company is that 90 percent of its passengers will use tokens and 10 percent will pay cash. Is that correct?

The WITNESS. Yes.

* * * * *

2417 Mr. BOOTH. If the examiner please, in view of the fact that we have had only a week's notice or eight days' notice of the resumption of these hearings to try to present and prepare facts upon the important issues involved here, the time has been insufficient; we, therefore, request that, while we have made some progress in getting some data together which we think will be helpful and of value to the Commission in the determination of the issues in this case, even under the limited character of the hearing, nevertheless I think we would all be better off if the Commission gave us a couple of weeks to conclude, if possible, the collection of the data and its preparation. I, therefore, ask that the case go over for two weeks.

Exam. KOCH. The examiner will have to deny that request because he is under instructions by the Commission to con-

clude this case at this hearing unless there is some extraordinary circumstances, and I don't regard that as an extraordinary circumstance for the reason that this isn't the first time this question was up.

* * * * *

DIRECT EXAMINATION OF DAVID A. KOSH, SENIOR RATE ANALYST, PUBLIC UTILITIES AND TRANSPORTATION DIVISION, OFFICE OF PRICE ADMINISTRATION

* * * * *

2424 By Mr. BOOTH:

Q. Now will you summarize the factual data that you have been able to collect? And in that connection I call your attention specifically to exhibit F-146—this has been marked for identification—the report of the Committee on Fare Structures of the American Transit Association.

A. You mean F-142. May I correct you?

Q. F-142; yes, sir.

A. Yes.

I found that report—and this is a copy of it—this brief—that report is a statistical analysis of the general proposition that there are three highly correlated factors:

The savings that can be obtained by the purchase of tokens;

The investment that has to be made in such purchase—that is, the minimum investment; and

2425 The degree to which tokens will be utilized under different conditions of savings and minimum investment in tokens.

Q. And do you regard this analysis as—or will you discuss the analysis that was made in this study in more detail?

A. Yes, sir.

The typewritten pages are merely the author's description of what he said on some of the statistical measures of the results.

The first photostatic table is merely a tabulation of actual data, the source of the data, and the last three columns——

May I say this first? After receiving this data the author processed it in order to get——

Q. Who were the authors?

A. A Mr. Stevenson, who is now senior statistician or head statistician of the A. T. A., and one of his associates—yes, sir—Mr. Ong.

They obtained this data and processed it to get implications out of it; and they came to the result that, given the saving

that is available through the use of purchase of tokens and the investment in such tokens, the use of those tokens could be predicted.

They found that relationship on the basis of this data and in the last three columns they indicate the difference between the actual facts as submitted to these companies and
2426 the prediction on the basis of this analysis.

Q. The last three columns of what?

A. Table A.

However, instead of indicating it in the percentage use of tokens they have translated that percentage use into average fare, which is a simple arithmetical calculation, merely multiplying the percentage use of tokens by token cost and the percentage use of cash fare by cash cost, and the result is the average fare on the system, and the last three columns indicate the degree to which, on the basis of this study, they could predict actual token use and, hence, average fare.

Q. Well, referring to table A, that shows the various local transportation and rapid-transit companies that sold token fares; is that correct?

A. That is right.

Q. And token and cash fares?

A. That is correct.

Q. And only token and cash fares; they did not sell passes, as you understand it?

A. No; companies that sold passes had to be excluded from this analysis.

Q. Do you know about how many companies are there?

A. I think 90-some-odd companies, with 127 instances. The reason the number of instances is larger is that during the period of this observation some of the companies
2427 changed their token system and, hence, the relationships of savings and investment were different, and use was different. I think there are 127 pieces of information contained in this table.

Q. Now did the study show that the greater the investment and the less the savings between the——

Mr. FINERTY. Now wait a second. You are not in a position to ask what the study showed; the study is before us here.

Mr. BOOTH. Well—I think it ought to be—it is proper to have it——

Mr. FINERTY. It may be explained——

Mr. BOOTH. And summarized.

Mr. FINERTY. Let your witness tell you what the study showed.

Mr. Booth. I am asking the witness what it showed.

A. Obviously, the connection is this: The greater the savings and the less the investment the greater the use of tokens or, conversely put, the less the savings taken over cash fare and the smaller the investment that has to be made in tokens the greater the use of such tokens.

By Mr. Booth:

Q. Now have you abstracted from the study the various companies that have sold tokens in quantities or in amounts of $1?

A. I have abstracted from the table those companies that required an investment of 60 cents or more as a mini-
2428 mum investment for tokens.

Q. Will you list those instances for the record and the tokens and show the average use of tokens under those circumstances?

A. Of all the companies that had required investments in tokens ranging from 60 cents to $1, inclusive, the use of such tokens varied from nine percent up to a maximum of 62 percent, the reason for that variation, of course, being the other variable, the savings available of tokens over cash fares; but the maximum use of tokens under an investment ranging from 60 cents to $1 on the basis of this study was 62 percent.

Q. Well—now what—let's take the Alabama Power Company, Montgomery Division: What was the cash fare there?

A. Eight cents.

Q. The token investment?

A. $1; 16 tokens for $1.

Q. And what was the token rate?

A. 16 tokens for $1, 6¼ cents per token, or a penny and three quarters saving in the purchase of a token.

Q. And the Columbus Transportation Company, in Columbus, Georgia.

A. They had a seven-cent cash fare, 15 tokens for $1, which means a 6⅔ cents cost, and they sold 15 percent; in other words, 15 percent of their riders used tokens under those conditions.

Q. What was the savings?

2429 A. Seven cents cash, 6⅔ cents for a token; or a third of a cent on seven cents, resulting in a 15-percent use.

Q. Have you tabulated that in the form of a sheet?

A. Yes, sir.

Mr. BOOTH. I suggest, in order to save some time, that he merely hand the sheet to the Reporter and let the Reporter copy it into the testimony; and then we can——

Exam. KOCH. How many have you got?

Mr. EISEN. He doesn't want it as an exhibit, as I understand it; he just wants it copied in as testimony.

Mr. FINERTY. I would like to see what conclusions he draws but, before that, Mr. Examiner——

Exam. KOCH. It isn't conclusions?

Mr. FINERTY. These are.

Mr. EISEN. These are in this exhibit.

Mr. FINERTY. Let me recall to you that exhibit. At the time F-142 was offered I called the examiner's attention to the fact that it had no reference whatever to the Hudson & Manhattan Railroad Company or to any conditions shown to have any reference to any conditions similar to those of the Hudson & Manhattan Railroad Company so far as traffic, territory, or any other material matter was concerned; and I stated then that, in my opinion, the exhibit was not admissible but I was glad to have the Commission have any information they might get on tokens.

2430 I want to now call your attention to the fact that these tabulations that he is making of the same effect——

May I just see that tabulation?

A. Yes, sir.

Mr. FINERTY. That the companies covered by the tabulation vary from Alabama, Montgomery, to Pueblo, Colorado, or Evansville, Indiana, Concord, New Hampshire, Utah, are scattered widely over the United States of America, and not one of them has the slightest relation to conditions between Jersey City and Manhattan, New York.

And I think I will be compelled to object to the admissibility of the tabulation on that ground.

Mr. BOOTH. You are objecting to my questioning this witness?

Mr. FINERTY. I am objecting to the whole tabulation and the whole subject as having no relevance whatever to this situation.

Exam. KOCH. You just hand that to the Reporter and let him copy that in because that,[1] as I understand it, is just recapitulation of the important items of the same type that are in your exhibit.

---

[1] See page 2430A.

A. They are taken exactly from table A, except I have taken those instances where an investment from 60 cents to $1, inclusive, was used.

2431. May I also point out one thing? I failed to explain this at the beginning:

Although this table was put in in 1937 we have attempted in the very short time available to spot-check it to see if, if it were brought up to date, the results would be substantially different, and such spot checks have been made——

2430a *Distribution of revenue passengers as between cash fare and reduced rate users for companies of table A [1] requiring highest investment*

	Token investment	Cash rate	Number of tokens	Token rate	Token ratio
		Cents		*Cents*	*Percent*
Alabama Power Co., Montgomery Div	$1.00	8	16	6.25	60
Columbus Transportation Co., Columbus, Ga.	1.00	7	15	6.67	15
Gary Rwys. Co., Gary, Ind.	1.00	8	14	7.14	31
Georgia Power Co., Atlanta Div	1.00	7	15	6.67	20
Madison Rwys. Co., Madison, Wis.	1.00	8	17	5.88	60
Savannah Elec. & Power Co., Savannah, Ga.	1.00	7	15	6.67	17
Southern Colo. Power Co., Pueblo, Colo.	1.00	7	15	6.67	25
Southern Ind. Gas & Elec. Co., Evansville, Ind.	1.00	6	20	5.00	50
United Traction Co., Albany, N. Y.	1.00	10	13	7.69	56
Utah Light & Traction Co., Salt Lake City, Utah	1.00	6	20	5.00	47
Witchita Trans. Co., Wichita, Kans.	1.00	7	15	6.67	17
Manchester St. Rwy. Co., Manchester, N. H.	.75	8	10	7.50	25
Manchester St. Rwy. Co., Manchester, N. H.	.75	10	10	7.50	62
2430b Northern States Power Co., Eau Claire, Wis. Div.	.75	6	13	5.77	12
Concord Electric Rwys., Concord, N. H.	.70	8	10	7.00	35
Dept. of St. Rwys., Detroit, Mich.	.60	6	11	5.55	49
Shreveport Rwys. Co., Shreveport, La.	.60	8	8	7.50	9

[1] Taken from table A of A. T. A. Fare Study—1937 Proceedings—page 940.

Mr. FINERTY. That just adds another objection, I think that this exhibit shows that most of the data in it long preceded 1937, when the study was completed.

A. Well— It was merely to meet that kind of an objection that we undertook to make the spot-check; and we sent out 10 telegrams; I think we got nine answers from cities throughout the country. And the check is extraordinarily good.

By Mr. EISEN:

Q. You are prepared to put that in?

A. Yes, sir.

By Mr. BOOTH:

Q. You go ahead.

By Exam. Kosh:

Q. I will ask a question on the point: Were you going to say as to what years were employed here in procuring the data upon which this is based?

A. This table A, Mr. Examiner, indicates—first column after the name of the company—indicates the year for which the data is taken.

By Mr. Booth:

Q. And for what years?

A. It goes, roughly, from 1926 and has some figures in it relating to 1935. The second one is 1921 and on one
2432 of those pages I remember seeing one as late as 1935. There are some as late as 1933.

Q. May I ask you this, Mr. Kosh: Have the fundamental principles with respect to the use of tokens differed in 1925, 1935, 1940, and 1943, as far as you have been able to determine from this study or any other information that you have been able to——

A. On general principles it doesn't seem to me there is much question but that the larger the saving the greater the use of tokens; the larger the investment the less the use of tokens.

But in order to have a statistical check on this I sent telegrams to certain companies and we have received answers; we sent out 10 or 11 telegrams and received nine answers. Those were tabulated and those are available. In those we asked for figures for 1943; and the results are for 1943.

On this table I have shown the data as applying to 1943 and the difference between the actual results obtained for those companies for 1943 or 1942, the latest data available, and those that would have been predicted or read off from this 1937 study.

Q. Do you have a copy of that?

A. I have several copies of it.

2433 Mr. Booth. We will make more. I ask that that be marked for identification as exhibit——

By Mr. Booth:

Q. What does that show?

A. In nine of these companies, the first column shows cash fare, the second token fare, the third column is computed saving, the fourth column is investment in tokens, the next column is estimated use in percentage, the percentage that

would have been read off from this 1937 A. T. A. study. The second column after that indicates the actual use as indicated to us by these companies.

For the nine companies the largest difference between what the A. T. A. study would show and what the company actually showed was 13.7 percent. The average divergency for all companies is 1.8 percent.

In other words, on the average these nine companies sold tokens to the extent of 1.8 percentage points more than the study would have indicated for that same group of companies under the conditions of token sale and investment.

Q. Of these instances listed in exhibit 154 how many were there where the average investment was $1 or the investment in tokens required was $1?

A. We couldn't find any from public documents. We couldn't find any companies that were at this time selling for $1; and it is our purpose to extend that search if we have the time, or, at least, to fill out this table of 10 to make it more comparable to the 127.

2434 Q. And there is one that is shown for $1?

A. I take that back. Yes, sir; there is one, halfway down the page.

Q. That is in Chicago?

A. Yes, sir.

Q. But that was the Chicago Surface Lines, prior to 1942; is that correct?

A. Well, that really is— I should have explained that. I am sorry. That one instance, the fifth one down the line, which says "cash fare, seven cents," is for the Chicago Surface Lines, and the percentage entered, 5.7 percent, is the average over the last five years of use of that combination cash and token fares; all others is of the latest data available, either 1942 complete or 1943 as available.

Q. What does it show the use of tokens was in Chicago, where the investment of $1 was required?

A. With an investment of $1 and a savings of 1/3 of a cent over a cash fare of seven cents, only 5.7 percent of the people took advantage of the tokens.

Q. And referring, again, to the study and the analysis made by the Committee on Fare Structures of the American Transit Associations, what use of tokens is indicated with an investment of $1, as required, and where there is a differentiation of 10 percent between the cash and the token fares?

2435 A. If you look at page 945, table B, of the photo-stated sheets, second part of table B, page 945 in the original volume, if you look down the left-hand column, first one in the last group, where it says 9.09 cents as cost for tokens, that is, where tokens are sold 11 for $1, and where cash fare of 10 cents is noted, you would find average fare of tokens and cash would come out for an indicated use of tokens of 33.6.

Q. That is to be contrasted with the company's estimate of 90 percent use of tokens as suggested by Mr. Brown in this case?

A. That is the figure that would be comparable or should be set down against the 90 percent.

By Mr. FINERTY:

Q. What company is that, incidentally?

A. Table B is not for specific companies; it is result of an analysis made of the 127; that is, after the man processed the 127 he got the relationship between the three variables that I indicated.

Q. Will you point out to me a nine-cent fare in the 127 listed here?

A. I indicated it is not for a specific company; I indicated also in the first table the man processed 127 pieces of data and drew a relationship between the three variables. He indicated how close those variables were for each of the 127 instances, a remarkably close agreement. Now, taking
2436 that average figure of relationship, he finds that where a cash fare of—11 for $1 were to be sold along with a 10-cent fare, his best estimate of the percentage of token use would be 33.78 percent.

Q. Well, in the preceding pages, listing the companies on which he based his calculations, it is true, is it not, there is not a single nine-cent fare or a single fare 11 for $1?

A. You mean 10-cent fare and 11 for $1.

Q. Yes, sir.

A. I haven't particularly looked at that but I will take your word for it.

Mr. EISEN. There is.

By Mr. BOOTH:

Q. Well— This is true, that most of the companies have found it to be quite unsatisfactory to sell tokens in the amounts of — requiring initial investment of $1? Is that true, based upon the——

By Mr. FINERTY:

Q. Have you any personal knowledge of that fact?

A. Well— This is what I would say:——

Q. No; I am asking you a question: Have you any personal knowledge?

A. Yes, sir. I am trying to explain that. I have. These 127 companies indicate actual situations. Now if your
2437 statement is correct—I haven't checked it for that particular point—that there is no company that used that combination, presumably there was reason for it, and it is my opinion that this study on the basis of this data is a very accurate one.

Q. Whatever the reason for it is, there isn't any data in here that shows that any company uses a cash fare of 10 cents or a token fare of nine cents and that the ratio of 33 percent on any known company is there?

A. I will say this, that none of these 127 instances uses that combination of fares——

Mr. FINERTY. Right.

Mr. BOOTH. May I suggest that we be allowed to proceed with our direct examination?

By M. BOOTH:

Q. May I call your attention, Mr. Kosh, to table A, 940, that there is, in Cincinnati, Ohio, 1932–1933—they sold—the cash fare there was 10 cents, and the token rate was nine cents?

A. I presume Mr. Finerty meant 11 tokens for $1; but there is a 10- and nine-cent combination; yes, sir.

Mr. FINERTY. That is right.

By Mr. BOOTH:

Q. Now let's take that Cincinnati situation for a moment. That shows in 1929 and 1930 that the cash fare was 10 cents and the token rate was 8.33, three for a quarter.

A. Three for a quarter.

2438 Q. And token investment was three for a quarter.

A. That is right.

Q. What was the token use in those years?

A. At that time, in 1929, 85 percent of the people used tokens; and in the next year, 86 percent of the people.

Q. All right. Then in 1932 the token investment was changed, is that correct, as well as the token fare?

A. Yes, sir.

Q. What was the change?

A. Well, they raised the investment to forty-five cents; and the average token cost from 8⅓ to nine cents; in other words, the saving was now less and the investment was larger.

Q. What was the investment required?

A. 45 cents instead of a quarter.

Q. Five tokens for 45 cents?

A. That is correct.

Q. What is shown to have been the use of tokens in 1932 and 1933, compared with the use of tokens in 1929 and 1930, when the tokens were being sold three for a quarter?

A. From 85 and 86 percent the token users dropped to 62 and 60 percent.

Q. Would you say that transportation companies have generally found that to be true, that the greater the investment, the smaller the difference between the cash and
2439 token fare, would result in a decline in the use of tokens?

A. I think this exhibit shows it and our spot-check brings it up to date.

By Exam. KOCH:

Q. Mr. Kosh, isn't there another element there in that Cincinnati situation? In 1930 they were selling three for a quarter and in 1932 they were selling what?

A. Five for 45

Q. Five for 45?

A. That is right. That is, they increased the average price of a token from 8⅓ to nine cents and increased the investment. In other words, they were decreasing the saving and increasing the investment, and on both counts the tokens used dropped from 86 to 62 percent.

By Mr. BOOTH:

Q. That bears out the principles established by the authors in this report; that is, that the greater the investment required and the smaller the difference there is between the use—between the cash fare and the token fare—results in a decline in the use of tokens?

A. That is correct. Let me explain this: This table does not prove the theory; it just checks that the general theoretical statement you made is correct.

Q. And that is the conclusion you arrived at, that the authors of this report of the Committee on Fare Struc-
2440 tures of the American Transit Association——

A. That is correct.

Q. Is that the tentative conclusion that you arrived at as a result of the preliminary analysis that you have made of the use of token fares by transportation companies?

A. That is right.

Q. Now let me call your attention to—you stated that you tried to check this report with other data; have you found some other instances, such as the use of tokens in the District of Columbia, recently, which bears directly upon your conclusions?

A. Yes, sir. Recently, I think about a year ago, the District commission considered the question whether, for the local situation, tokens that had been sold six for 50 cents and a 10-cent cash fare should not now be sold at three for a quarter and a 10-cent cash fare. There is one of the variables that has been held constant, in other words, the savings, but the savings remained in both instances 1⅔ cents on a ten-cent fare; the only thing they varied was the actual investment.

The commission came to the conclusion in that case that there were people who could not afford to make a 50-cent investment and that greater token use would result from a decrease in the investment required from 50 cents to a quarter, and the order as it came out was that tokens should
2411 be sold three for a quarter. There is another older case on that, one of the old Minnesota cases.

Q. I want to hand—7 P. U. R., State of Minnesota v. St. Paul Railway Company, where—if I can read it, with the consent of the examiner, 7 P. U. R., N. S., 174—where the Minnesota district court enjoined an order of the Minnesota railway commission because the commission required the company to change its token-fare structure from 10 cents cash for a single fare or six tokens for 45 cents to 10 cents cash and two tokens for 15 cents, the tokens still costing 7½ cents; the district court held—

Mr. FINERTY. Mr. Examiner, I don't like to interrupt but I understand argument ——

Mr. BOOTH. I wasn't arguing; this is merely another instance of where ——

Exam. KOCH. You can include that in your brief.

Off the record. We will take a five-minute recess.

(A short recess was taken.)

Exam. KOCH. On the record.

Proceed, Mr. Booth.

By Mr. Booth:

Q. Mr. Kosh, do you consider this exhibit F-142 an authoritative study on the use of fare structures—on the use of tokens in local transportation and rapid-transit fare structures?

2442 A. Not only is it authoritative, but it is the only one I have been able to find, any objective statistical analysis on figures that could be checked that is available.

Mr. Booth. I ask that it be received in evidence.

Exam. Koch. It is received.

(Exhibit F-142, Witness Kosh, received in evidence.) [See pp. 47 ff., *infra*.]

Mr. Finerty. I would like to specify an additional objection: There is no indication here that any of these token studies involve the use of tokens, not only what saving involved on the particular line but a saving on another route, and I renew my other objection to the exhibit.

By Mr. Booth:

Q. Mr. Kosh, you are in the course of studying this whole problem further and do you—and with the intention of bringing it down to date and showing its specific application to the operations of the Hudson & Manhattan operations?

A. Yes, sir; as I said, in a very short time all we could do was to get these 10 telegrams out to get some checks and there is a lot more that could be done if we had time.

By Mr. Finerty:

Q. And what do you mean by——

Mr. Finerty. Now wait a minute.

Mr. Booth. Just a minute.

By Mr. Booth:

Q. Do you believe, on the basis of your preliminary

2443 study, that it does substantially apply to the Hudson & Manhattan as well as the operations of any other transportation system which would be using token fares?

A. I think this study covers a broad enough range of companies and the checks that they have made on it and the check that I have made on it—I think that indicates its broad applicability; yes sir.

Q. And do you think, on the basis of the study which you have made—Have you reached a preliminary conclusion as to whether the contention or suggestions or testimony offered by the company that there would be a 90 percent sale of tokens is correct or incorrect?

A. I believe the estimate of 90 percent is incorrect, for this reason:

On the basis of the prepared study itself there is an indicated token use of 33-and-some-odd percent.

On the spot-check we have been able to make we found a maximum divergency of 13.7 percent.

Assume even that this 33-percent figure were out by the full 13; corrected to that extent that would still indicate a 46-percent use.

I can't conceive what factors would cause the difference between maximum use of 46-percent and the 90-percent assumption of the company.

Q. Do you believe the 90 percent of the company to be clearly incorrect?

2444 A. I think that is clearly excessive.

Q. Now could you tell the Commission about how much time, considering your other obligations in the public-utilities branch of the Office of Price Administration, in connection with other cases upon which you are engaged—how long it would take you to complete your study?

A. Well, if I had about 30 days and assuming that the companies from which we ask for information cooperated as well as these companies, nine out of ten of whom answered telegrams, I think in 30 days we could have an up-to-date, fairly complete study covering that.

Mr. FINERTY. May I ask a question in that connection?

By Mr. FINERTY:

Q. Do you anticipate it would change your conclusion that the ratio of sale of tokens to cash fares varies with the differentiation of tokens to cash fares and on the amount of the token investment?

A. I don't think it would change that principle at all.

Mr. FINERTY. We will admit the principle; it is its application to the facts that is in question here.

A. All the further study would show would be more precisely the statistical application.

* * * * *

By Mr. BOOTH:

2445 Q. Mr. Kosh, at my direction did you visit the offices of the Hudson & Manhattan Railroad last week?

A. Yes, sir; I was over there last Wednesday morning.

Q. And you asked the company to make available to you information for use in this proceeding, the following data:

A. Yes, sir; that is right.

Mr. FINERTY. Mr. Examiner, that is in the record already.

2446 Mr. BOOTH. No; the list isn't in the record; and I was merely doing it because I wanted to identify it. Will[1] you hand that to the Reporter and have him copy the list of the information that we requested?

Mr. FINERTY. I would like the record to show it is the same list I handed the examiner, which he sustained an objection concerning the data.

Mr. BOOTH. Yes, sir. You gave us the information identified as item No. 10 and refused to give us the other information. The record shows we believe all the other data to be relevant.

By Mr. BOOTH:

Q. Now, Mr. Kosh, have you prepared a table showing the seven-months condensed income statement for the Hudson & Manhattan Railroad, predicated upon its own figures for the first seven months of 1943, compared with the first seven months of 1942?

A. I have not prepared it.

When I was over at the Hudson & Manhattan office Mr. Finerty made a copy of such report available to me, indicating it was also available at the I. C. C. and that is correct; it is exactly the same thing.

Q. We —Just a moment.

Mr. FINERTY. That was furnished to you confidentially and with the understanding that it was embraced by those matters that I had checked, and would not be offered.

2446A The following information would be desirable in connection with the forth coming proceeding concerning the Hudson and Manhattan Company:

1.) Operating Expenses—(Detailed by lines operated, if available):

a. 1942.

b. 1943 (As much as available).

c. 1942 (period corresponding to 1943).

2.) Operating Revenue (Detailed by lines operated):

a. Same periods as (1) above.

3.) Income Statement—Detailed by lines operated, if available).

4.) Profit & Loss Account:

---

[1] See page 2446A.

a. Same periods as (1) above:
5.) Balance sheet:
a. Dec. 31, 1942.
b. Latest date available.
6.) Road & Equipment:
a. Same as (5) above:
7.) Nonutility operation:
a. Revenue.
b. Expenses.
c. Balance sheet.
8.) Bonds Outstanding:
a. Mortgage Bonds:
2446B (1) Amounts outstanding at end of 1940, 1941, 1942, and latest date 1943.
b. Income Bonds:
(1) Same as (a) above.
9. Interchange Revenue from Penna. R. R. (If not detailed on Income Statement):
a. 1942.
b. 1943 (As much as available).
c. 1942 (Period corresponding to 1943).
10. Passenger Volume:
a. By individual line:
(1) By month—Jan. 1942 to date.
2447 A. I merely want to say it is exactly the same as that in the I. C. C. files.
Mr. Booth. Just a moment.
I want it to be marked for identification.
Mr. Finerty. Mr. Examiner, I am going to object to its being marked for identification; it is within the data that you ruled would not be furnished and was furnished by me to Mr. Kosh merely for his convenience with the understanding that it would not be offered here in that form.
A. I don't think that is quite correct, Mr. Finerty.
Mr. Booth. Well—I would have tried to get it; whether you gave it to us—It is available in the I. C. C. offices.
Mr. Finerty. You can offer it right now; I will admit it appears in the Interstate Commerce Commission and I object to it under the limited issues in this case and the objection has already been sustained.
A. May it be marked as exhibit——
Exam. Koch. There is no occasion for that.
Mr. Booth. You won't allow it to be marked?

Exam. Koch. No.

There is no occasion for that at all because it is included in the previous rulings I have made; and it is irrelevant.

Mr. Eisen. Don't we have a right to have it marked for identification?

2448 Exam. Koch. Not if it is irrelevant.

A. I know this isn't my prerogative as a witness, but Mr. Finerty made the statement this was given to me with the understanding that it would not be used at the hearing; I don't think he meant that.

He indicated that it was part of the information that he didn't think was relevant.

However, since it was available at the I. C. C. he was making it available to me; there was no stipulation.

Mr. Finerty. More accurately, say I didn't expect Mr. Booth to get it in through the back door.

He ruled out the other evidence.

A. I am not talking about that; I am talking about the fact there was no stipulation.

Mr. Finerty. You are correct.

Mr. Booth. I just want to be certain the examiner is excluding that, and want to make my record.

Exam. Koch. I wish the record to be perfectly clear about it:

It is excluded because under the issues as the Commission has laid them down at this further hearing I cannot receive it.

Mr. Booth. May I state, then, for the purposes of the record, that we would demonstrate that without adjust-

2449 ment of the company's operating claimed expenses with respect to the item of $240,000, which we would also show there is no basis for in view of existing conditions, that the current earnings of the company——

Mr. Finerty. Mr. Examiner, before he sticks this in the record:

He is trying to get in the back door and evade your ruling and get into the record what you ruled out.

Mr. Booth. I am going to make an offer of proof:

Mr. Finerty. I object.

Mr. Booth. You made an offer of proof yesterday in which you read in detail the figures, after the examiner refused to allow the data to be presented.

Mr. Finerty. This is ruled out by the examiner as not within the ——

Mr. Booth. I am not going to read any figures; I am merely going to state what the Commission stated, that the——

May I state this, then? That in its 1938 order in this case the Commission estimated that the earnings of the company would be a certain figure under the eight-cent fare; in its June 8th order the Commission estimated the earnings of the company would be a certain amount under the nine-cent fare; if we were given an opportunity to demonstrate by the presentation of evidence in this hearing we would show that the current earnings of the company at the eight-cent fare
2450 and for the full year 1943 will exceed either of the amounts which the Commission found to be adequate and reasonable in these two previous orders and that if an adjustment were made for items of expenses which we believed to be without foundation or reason that the earnings would still be substantially higher, and that is proof that we would present if we were given an opportunity to do so. Now——

Exam. Koch. I understand you are going to ask the Commission later on in a formal manner to reopen this so you can present that evidence.

Mr. Booth. I will file that motion in writing even before any briefs or anything else are filed; I will file that with the Commission at the earliest possible time.

Exam. Koch. Very well.

By Mr. Booth:

Q. Mr. Kosh, have you made a study—attempted to get some data with respect to insurance rates and regulations for war damage?

By Mr. Eisen:

Q. Have you made certain studies of the applicable premium rates for war-damage insurance as provided by the War Damage Corporation?

A. Yes, sir; I have.

Q. And will you please state in your own words the result of your study as applied to war-damage coverage for the Hudson & Manhattan Railroad as made available by the War Damage Corporation?

2451 A. Under the rate in force by the War Damage Corporation for insurance the highest rate applicable to any class of property owned by the Hudson & Manhattan Company would, under 100-percent insurance, be at the rate

of 18 cents per $100. That means at the rate of $1,800 per $1,000,000.

In other words, if the company wanted to insure itself this year against a possible damage of $240,000 the rate would be $1.80 per $1,000 or $1.80 times 240, which would be about $400.

Q. And exactly what risks would that cover, Mr. Kosh?

A. That covers against all damage resulting from enemy attack or from the efforts of the United States forces in repelling enemy attack, any bombing or any shelling or anything of that sort.

Mr. Fineberty. Not including, of course, damages due to speed-up of war traffic or drafting of experienced employees.

A. Just as I indicated.

By Mr. Eisen:

Q. Yes, sir; just as you indicated.

You could get that rate and limited exactly to what you stated, damage by the enemy——

A. And by American forces in repelling an enemy.

* * * * *

2470 Mr. Booth. The record will show that we reserve the right to have him present a more complete study if an opportunity is afforded to us by the Commission.

Exam. Koch. You mean you ask for the right?

Mr. Booth. Yes, sir; certainly.

* * * * *

2475 Mr. Booth. If the Commission desires to give us an opportunity to file briefs and will give us a reasonable time to file a brief we will take advantage of that opportunity; however, I should like to make it clear that, considering the basic issues in which the Price Administrator and the Economic Stabilization Director are interested, that the limited stage of the record, limited status of the record, and the denial of our right to demonstrate on the basis of the existing financial conditions and earnings of the company that no rate increase whatsoever is justified, that we would have very little use in presenting a brief to the Commission because of the denial so far of the right to open up the record.

TEXT MATERIAL OF EXHIBIT F-142

(Including Certain Charts)

REPORT OF COMMITTEE ON FARE STRUCTURES

To the American Transit Operating Association:

GENTLEMEN: The Committee on Fare Structures presents herewith its report for the year 1937.

The work of the Committee this year, part of which is a continuation of last year's work, has been subdivided as follows:

1. Completion of the study begun last year of the effect on the average rate of fare of the differential between cash and token rates and also of the minimum investment in tokens.
2. A study of the more recent trends in fare experiments and the reporting of any significant developments.
3. A study of present day transfer privileges and the reporting of any interesting or novel practices found which have general application.
4. Report of the results of the investigation being made by Charles A. Stephenson, of Association headquarters, on the effect of the various factors that influence riding habit.

PROGRESS REPORT

1. Cash and Token Rates.

A preliminary report on cash and token rates was prepared last year, but its publication was withheld pending further study by your Committee. The report is now completed and is submitted in final form as Appendix A.

2. Recent Fare Trends.

A series of reports covering present day fare practices on various properties and the experience with those rates of fare have been prepared by individual members of the Committee. These reports deal with the following subjects:

Pass rate of fare structure.
Cash and ticket rates.
Permit rate of fare structure.
Promotional or special rates.
Fare practices where more than one type of transit vehicle is operated or where one type has replaced another.
Publicity methods used in connection with various fare structures.

Factors now existing that will influence future fare structure policies.

The foregoing series of reports contain much information of interest and value. Because of their volume and the fact that the subjects are so diversified and, therefore, difficult to combine in a composite report, it was not considered feasible to publish them. Copies of each are available to member companies on application to Association headquarters.

3. Transfers.

Your Committee prepared a report on the transfer privileges in effect on a number of the larger properties which discloses a number of interesting practices, many of which are closely related to special local conditions. The complete report, together with samples of transfers used by a number of companies, is available to member companies upon request to Association headquarters, and is not included herein.

4. Analysis of Factors Affecting Riding Habit.

A most interesting investigation has been made by Charles A. Stephenson, statistician of the Association staff, applying the method of multiple correlation analysis to the problem of determining separately the effects of various major factors which cause variations in transit riding habit. This method was applied to an analysis of the riding habit on one of the large transit properties in this country, and although the results of this particular study are applicable only to the conditions existing in that city and are academic in that they deal only with riding habit—eliminating consideration of either earnings at various fare levels or costs to provide various standards of service—the method of analysis seems to offer broad possibilities for the analysis of the transit situation in a given community to the end of providing a more scientific guide than has heretofore been available in fitting transit service and rates to changing conditions in a given community. The report of this study is not yet available but it is hoped that it can be put in final form at an early date and made available to member companies.

CONCLUSIONS

Your Committee believes that the report contained herein on cash and token fares (Appendix A) is complete and final.

Your Committee believes also that the results of further investigations now under way by Mr. Stephenson, intended to disclose the fare structure and standard of service on the

property under consideration which will result in the greatest use of the service and maximum net earnings, will, when completed, be of great significance and value to the transit industry. In the meantime, his analysis of riding habit trends when made available is commended to the attention of the industry as a unique piece of work that, in itself discloses highly significant relationships and indicates the possibilities of applying the multiple correlation analysis method to the study of transit economics and operation.

RECOMMENDATIONS

1. The Committee recommends that at as early a date as possible a study be made similar to the one contained in Appendix A, on cash and token rates, but covering properties which have various forms of passes in addition to cash and token rates.

2. That Association headquarters arrange to complete and make available to member companies at as early a date as possible, the results of Mr. Stephenson's studies, referred to in this report.

Respectfully submitted.

C. M. Ballou, Wm. B. Bennett, C. S. Burlingham, F. L. Butler, B. W. Campbell, William R. Castle, C. H. Dahl, H. L. Eberts, Ernest M. Flint, C. H. Fosgard, John F. Gallagher, C. W. Gifford, Adrian Hughes, Wm. M. B. Lord, I. O. Mall, John V. McKinney, S. E. Mason, Joe R. Ong, H. C. Patten, W. S. Rainville, Jr., Richard Sachse, C. C. Schaefer, L. F. Seybold, J. V. Sullivan, E. A. Tuson, H. E. Weyman, Elton S. Wilde, E. F. Malz, Vice Chairman, Geo. E. Owen, Chairman.

Committee on Fare Structures.

Appendix A—Cash and Token Rates

A study of the effect on Average Rate of Fare resulting from various differentials between cash and token rates and also from the minimum required investment in tokens.

By Chas. A. Stephenson and Joe R. Ong

The consideration of cash and token rates is only one of several factors involved in the study of Fare Structures but